82-1868

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ARNOLD TRANSIT COMPANY, INC., STRAITS TRANSIT COMPANY, and SHEPLER'S INCORPORATED,
Appellants,

v

THE CITY OF MACKINAC ISLAND, a Charter City, incorporated pursuant to Local Acts 1899-No. 437,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. WHETHER AN ISLAND MUNICIPALITY LOCATED IN THE GREAT LAKES, SURROUNDED BY NAVIGABLE WATERS OF THE UNITED STATES, CAN PASS AN ORDINANCE REQUIRING EXISTING BOAT COMPANIES THAT TRANSPORT PASSENGERS AND FREIGHT (INTERSTATE & INTRASTATE) TO AND FROM THE ISLAND TO PAY A "FRANCHISE FEE" TO THE MUNICIPALITY BASED ON 1½% OF THE BOAT COMPANIES' GROSS RECEIPTS FOR THE PRIVILEGE OF ENTERING AND DEPARTING FROM THE MUNICIPALITY'S HARBOR AND WHEN THERE IS NO SIMILAR TAX ON ANY OTHER BUSINESSES IN THE MUNICIPALITY AND WHEN THE PURPOSE OF THE "FRANCHISE FEE" IS TO CHARGE THE PASSENGERS A FEE FOR COMING TO AND LEAVING THE MUNICIPALITY'S HARBOR AND WHEN THE MUNICIPALITY PROVIDES NO SPECIFIC BENEFIT TO THE BOAT COMPANIES OR THEIR PASSENGERS?

II. WHETHER AN ISLAND MUNICIPALITY LOCATED IN THE GREAT LAKES, SURROUNDED BY NAVIGABLE WATERS OF THE UNITED STATES, CAN PASS AN ORDINANCE REQUIRING EXISTING BOAT COMPANIES THAT CARRY PASSENGERS AND FREIGHT (INTERSTATE & INTRASTATE) TO AND FROM THE ISLAND TO BE REGULATED BY THE MUNICIPALITY AND PAY A FEE OF 1½% OF THE BOAT COMPANIES' GROSS RECEIPTS TO THE MUNICIPALITY, WHEN THE BOATS CLEARLY OPERATE IN INTERSTATE COMMERCE, WHICH THE FEDERAL GOVERNMENT HAS THE POWER TO CONTROL UNDER THE COMMERCE CLAUSE AND HAS EXERCISED THAT POWER IN THE FORM OF THE WATER CARRIERS ACT AND WHEN CONGRESS HAS THE EXCLUSIVE POWER OVER NAVIGABLE WATERS OF THE UNITED STATES?

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The Opinion of the Michigan Supreme Court is reported at 415 Mich 362; __ NW2d __ (1982) and is printed in the Appendix hereto, infra, page 1a. The Opinion of the Michigan Court of Appeals is reported at 99 Mich App 266; 297 NW2d 904 (1980) and is printed in the Appendix hereto, infra, page 4a. The Opinions, Judgments and Orders of the State of Michigan, County of Mackinac Circuit Court are printed in the Appendix hereto, infra, pages 15a-42a.

JURISDICTION

This is an appeal from a determination by Michigan State Courts upholding the validity of a State statute and a municipal ordinance adopted pursuant to that statute against a claim of repugnancy to the United States Constitution. The Opinion of the Michigan Supreme Court (Appendix, infra, page 1a) was entered on December 22, 1982. A timely Motion for Rehearing was denied on February 18, 1983 (Appendix, infra, page 2a). The Notice of Appeal was filed on May 11, 1983 in the Michigan Supreme Court. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. §1257(2). *Erznoznik* v *Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1977).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

I. U.S. Constitutional Provisions

A) Article I, Section 8, Clause 3 which states as follows:

"The Congress shall have Power . . .

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

B) Article I, Section 10, Clause 3 which states in pertinent part that:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, . . ."

C) Article VI, Clause 2 which states as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

D) Amendment V which states as follows:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

E) Amendment XIV, Section 1 which states as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. Statutes

A) 49 U.S.C.A. §902(c,d,f):

"(c) The term 'water carrier' means a common carrier by water or a contract carrier by water.
(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I [§§1-5, 5b-15a, 16, 17-23, 26, 27 of this title] in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I [§§1-5, 5b-15a, 16, 17-23, 26, 27 of this title].
(f) The term 'vessel' means any watercraft or other artificial contrivance of whatever description which is used, or is capable of being, or is intended to be, used as a means of transportation by water."

B) 49 U.S.C.A. §906 which is set forth in its entirety in the Appendix hereto, infra, pages 43a-46a.

C) 49 U.S.C.A. §909 which is set forth in its entirety in the Appendix hereto, infra, pages 47a-52a.

D) 49 U.S.C.A. §10102(25-27):

(25) 'vessel' means a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used, as a means of transportation by water.
(26) 'water carrier' means a water common carrier and a water contract carrier.
(27) 'water common carrier' means a person holding itself out to the general public to provide water transportation for compensation."

E) 49 U.S.C.A. §10544(a):

"(a) Except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out the transportation policy of section 10101 of this title, the Commission does not have jurisdiction under this subchapter over transportation by water carrier when the transportation is provided—

(1) entirely in one harbor or between places in contiguous harbors, other than transportation under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the limits of the harbor or the contiguous harbors;

(2) by a vessel of not more than 100 tons carrying capacity or 100 indicated horsepower;

(3) by a vessel carrying only passengers equipped to carry not more than 16 passengers;

(4) by a ferry;

(5) by a water carrier transporting equipment of contractors used, or to be used, in construction or repair for the water carrier; or

(6) to carry out salvage operations."

III. Ordinance

The City of Mackinac Island Ferry Boat Code Ordinance is set forth in its entirety in the Appendix hereto, infra, pages 53a-59a.

STATEMENT OF CASE

Appellants are boat companies that have been operating boats to and from Mackinac Island for many years. Appellant Arnold Transit Company has been in existence since the late 1800's and the other two Appellants have been in existence since the mid-1940's. During all their years of existence, Appellants were never licensed, regulated or franchised by the Appellee City of Mackinac Island (hereinafter referred to as the City or Appellee.) However, in 1977, the City found itself looking for ways to raise revenue. It was generally agreed by the City's Council members that any revenue should not be raised at the expense of the residents or businesses of the City. It was also generally agreed that the tourists who visited the City should bear the burden of providing the needed revenues. Since the boats lines brought the tourists to Mackinac Island and since members of the City Council felt the boat companies could pass along to the tourists any fees that the City might require of the boat companies, the City Council devised the Ferry Boat Code. The Ferry Boat Code designates each boat company to be a ferryboat company and requires each ferryboat company to obtain a franchise, i.e. right to operate, from the City in order to remain in business. The fee is 1½% of the monthly gross receipts. In return for this fee, the ferryboat companies are "given" a bare "right to continue to operate", which the City has labeled as a franchise.

Each boat company uses privately-owned docks. No street lights, street sweeping, or snow removal is provided by the City on the docks used by the boat companies. The City does not dredge the harbor nor provide a harbor master. The use of water and sewage, fire and police protection are paid through general ad valorem taxes, and usage charges. In fact, the City provides nothing more to the boat companies or their passengers than is already provided to all the businesses and residents of the City.

Appellants transport passengers, freight and/or mail to and from the City across the Straits of Mackinac, which connect two of the Great Lakes, Huron and Michigan. More than 90% of the ticket sales for Appellants occur outside the City.

Since 1942, Appellant Arnold Transit Company has been authorized by the Interstate Commerce Commission to engage in interstate commerce. Arnold Transit Company is required to file with the Interstate Commerce Commission a Local Passenger Tariff and any change in the previous tariff must be filed and approved. This tariff, if approved, provides the rates to be charged passengers and for various classifications of freight over designated routes, according to the nature of the trip purchased. This tariff also provides rules governing the season of navigation to which the fares are applicable, and provides other rules governing baggage, ticket redemption, stopovers and fares for individual routes. The Interstate Commerce Commission periodically sends auditors to examine Arnold Transit Company's books of account, and to review fares charged, rates, schedules, and other matters. Interstate Commerce Commission auditors have examined the books of Arnold Transit Company in 1963, 1969, and 1974.

Arnold Transit Company currently holds a contract with the United States Postal Service to deliver mail to and from the City of Mackinac Island.

Approximately 44.6% of the freight carried by Arnold Transit Company each year to the City of Mackinac Island has its origin outside the State of Michigan, and arrives at the mainland docks of Arnold Transit Company by truck and railroad on a through bill of lading.

Approximately 95% of the passengers carried annually by Arnold Transit Company, Straits Transit Company, and Shepler's, Inc. to the City of Mackinac Island arrive at the mainland docks of Arnold Transit Company, Straits Transit

Company and Shepler's, Inc. at St. Ignace and the Village of Mackinaw City by private automobile.

A license plate survey conducted during the 1978 season showed that approximately 40% of those private automobiles were licensed in states or provinces other than Michigan.

Approximately 10,419 of the passengers traveling to the City of Mackinac Island via Arnold Transit Company and Straits Transit Company each year arrive via bus lines on through ticketing from outside the State of Michigan. There are 77 tour organizers, tour operators, and bus lines who perform or assist in the performance of through ticketing and package tours for Arnold Transit Company and Straits Transit Company. These organizers, et cetera are located in approximately twenty-one different states and the Province of Ontario.

Shepler's, Inc. has passengers who travel from the Village of Mackinaw City to the City of Mackinac Island from out-of-state on organized package tours purchased out-of-state, but does not maintain records which would show numbers of passengers.

The total number of passengers carried by Appellants during 1977 was nearly 700,000.

All of the above facts are taken from Stipulated Statement of Facts Not In Dispute, agreed to by the attorneys for the parties, and filed with the Trial Court on August 25, 1978.

EXISTENCE OF JURISDICTION BELOW

The federal issues involved in the Questions Presented in this Jurisdictional Statement were all raised in the Trial Court, the Michigan Court of Appeals, and the Michigan Supreme Court.

Tonnage Tax Issue

The City's violation of the tonnage tax prohibition of Article 1, Section 10, Clause 3 of the U.S. Constitution was first raised in paragraphs 12, 13, 14 and 15 of Appellants' Complaint, which are printed in the Appendix hereto, infra, pages 60a-61a.

In its Decision filed May 12, 1978, the Trial Court recognized that:

> "It is contended the Code is an invalid tax upon the business of the F B O without authorization by statute, charter or constitution and totally out of proportion to any benefits received, and unrelated to costs of regulation."

The Trial Court then concluded that a franchise fee is not a tax. Accordingly, the Trial Court granted summary judgment on Appellants' claim that the franchise fee was a tax, but reserved judgment on Appellants' insufficient nexus claim. The relevant portions of the May 12, 1978 Decision of the Court are printed in the Appendix hereto, infra, pages 30a, 36a-37a.

In their Proposed Findings of Fact and Conclusions of Law filed August 30, 1978, Appellants renewed their claim that the franchise fee was unauthorized taxation and stated that:

> "In addition, such a tax violates the provisions of U.S. Constitution, Article I, Section 10, Clause 3 which prohibits the imposition of any duty of tonnage."

In its Decision filed September 26, 1978, the Trial Court denied Appellants' Motion for Rehearing as to those issues disposed of by the Court's partial summary judgment. The Trial Court then went on to conclude that Appellants:

> " . . . failed to establish their respective claims as set forth in their complaint with respect to those issues which have survived the partial summary judgment

heretofore granted. The relief requested by Plaintiffs is denied; judgment shall be entered on behalf of Defendant together with costs."

Argument V of Appellants' Brief on Appeal to the Michigan Court of Appeals and Argument IV of Appellants' Brief on Appeal to the Michigan Supreme Court dealt specifically with the tonnage tax issue.

Fourteenth Amendment Issues

The City's violation of the equal protection clause and the due process clause of the Fourteenth Amendment to the U.S. Constitution was presented in the Complaint filed by Appellants on July 21, 1977 in Paragraphs 13, 14, 15 and 25 which are printed in the Appendix hereto, infra, pages 60a-61a.

Acting upon general motions for summary judgment, the Trial Court rendered a decision adverse to Appellants on many claims. This decision was filed on May 12, 1978 and the relevant language of this Decision is quoted in the Tonnage Tax portion of this section entitled Existence of Jurisdiction Below.

The Trial Court then concluded that the determination of the amount of the franchise fee based upon gross receipts was proper and quid pro quo for the property right of operating a ferry. However, the Trial Court denied summary judgment as to the contention of Appellants regarding a due process of law violation. The relevant portions of the May 12, 1978 Decision of the Court is printed in the Appendix hereto, infra, pages 30a, 31a, 36a-37a, 41a.

In their Proposed Findings of Fact and Conclusions of Law filed August 30, 1978, Appellants set forth their Fourteenth Amendment arguments. The summary statements of these arguments as quoted from the Proposed Findings of Fact and Conclusions of Law are printed in the Appendix hereto, infra, pages 62a-63a.

In its Decision filed September 26, 1978, the Trial Court denied Appellants' Motion for Rehearing as to those issues disposed of by the Court's partial summary judgment. The relevant language of this Decision is quoted in the Tonnage Tax portion of this section entitled Existence of Jurisdiction Below.

In their Brief on Appeal to the Michigan Court of Appeals, Appellants discussed the following violations of the Fourteenth Amendment to the U.S. Constitution:

a) Appellants are the only businesses which the City requires to pay a fee based on gross receipts despite the fact that there are many other businesses which serve the same people that Appellants serve.

b) All other businesses involved with the City are licensed at a nominal rate and Appellants' fees would be excessive by comparison.

c) The City offers no benefit or property right in exchange for the franchise fee.

d) The franchise fee is an unauthorized tax.

e) The City intended that the franchise fee be passed along to Appellants' passengers so as to "clip the tourists."

f) The Ferry Boat Code violates the constitutionally protected freedom to travel.

The relevant portions of Appellants' Brief on Appeal are printed in the Appendix hereto, infra, pages 64a-71a.

In their Brief on Appeal to the Michigan Supreme Court, Appellants discussed the following violations of the Fourteenth Amendment to the U.S. Constitution:

a) The City lacked any justification for the exorbitant franchise fee it was requiring of Appellants.

b) The City offers no benefit or property right in exchange for the franchise fee.

c) The franchise fee is an unauthorized tax.

d) The fee demanded of Appellants is not identical in kind to those required of proprietors of hacks.

e) No other business on Mackinac Island is charged any kind of fee based on its gross receipts.

f) The City intended that the franchise fee be passed along to Appellants' passengers.

g) The Ferry Boat Code violates the constitutionally protected freedom to travel.

The relevant portions of Appellants' Brief on Appeal to the Michigan Supreme Court are printed in the Appendix hereto, infra, pages 72a-84a.

Undue Burden on Interstate Commerce Issue

Appellants' claim that the City's Ferry Boat Code causes an undue burden on interstate commerce was first raised in Appellants' Complaint in Paragraphs 5 and 18 which are printed in the Appendix hereto, infra, pages 60a-61a.

Appellants discussed this claim in their Proposed Findings of Fact and Conclusions of Law filed August 30, 1978 with the Trial Court and in their Supplemental Argument to Appellants' Proposed Findings of Fact and Conclusions of Law filed September 14, 1978 with the Trial Court.

In its Decision filed September 26, 1978, the Trial Court concluded:

> ". . . that the adoption of the FBC [Ferry Boat Code] and its enforcement will not place an undue burden on interstate commerce as respects the FBO [Appellants herein]."

The relevant portions of the September 26, 1978 Decision of the Trial Court are printed in the Appendix hereto, infra, pages 23a-24a.

Argument VI of Appellants' Brief on Appeal to the Michigan Court of Appeals and Argument V of Appellants' Brief on Appeal to the Michigan Supreme Court dealt specifically with the undue burden on interest commerce issue.

Federal Preemption Issue

The issue of federal preemption of the City's authority to regulate Appellants' boat lines was first raised in the Complaint in Paragraph 16 which is printed in the Appendix hereto, infra, page 61a.

In its Decision filed May 12, 1978, the Trial Court concluded that the Ferry Boat Code was not preempted by federal law and regulation. Accordingly, the Trial Court granted summary judgment against Appellants on the issue of federal preemption.

The relevant portions of the May 12, 1978 Decision are printed in the Appendix hereto, infra, pages 30a, 31a, 37a-39a.

Appellants filed a timely Motion for Rehearing of the partial summary judgment awarded the City and in its Decision filed September 26, 1978, the Trial Court denied the Motion for Rehearing. The relevant portions of the September 26, 1978 Decision are printed in the Appendix hereto, infra, pages 16a, 24a.

Argument VIII of Appellants' Brief on Appeal to the Michigan Court of Appeals and Argument VI of Appellants' Brief on Appeal to the Michigan Supreme Court dealt specifically with the federal preemption issue.

Following the October 26, 1978 entry of the Trial Court's Judgment and Final Order, Appellants filed a Claim of Appeal from the Order with the Michigan Court of Appeals.

By an Opinion filed August 11, 1980, the Michigan Court of Appeals held that the City had the authority to enact the Ferry Boat Code, and that the franchise fee ordinance was valid. Beyond a statement that it had carefully reviewed Appellants' other allegations and found them to be without merit, the Michigan Court of Appeals did not discuss Appellants' federal issues.

By Order filed September 22, 1980, the Michigan Court of Appeals denied Appellants' timely Motion for Rehearing. On October 14, 1980, Appellants filed an Application for Leave to Appeal with the Michigan Supreme Court. By an Order filed August 28, 1981, the Michigan Supreme Court granted Appellants leave to appeal.

In a one sentence Opinion dated December 22, 1982, the Michigan Supreme Court affirmed without discussion the Michigan Court of Appeals' Opinion. On February 22, 1983, the Michigan Supreme Court denied Appellants' Motion for Rehearing.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The United States Constitutional issues raised by the municipal ordinance allegedly passed under Michigan statutory authority require full and careful consideration, with briefs on the merits and oral argument. Appellee has devised a new, if not an unique, method of taxing persons and property for the privilege of coming into and leaving the city limits of a municipality. Appellee happens to be a municipality located on an island so they could tax the tourists by placing a gross receipts tax on the major carriers of passengers and property, i.e. the boat lines that travel to and from the Island, not on state highways, but on navigable waters of the United States. The method was picked because it was the easiest, surest and possibly the only way to get at the tourists without burdening residents who may not use the boat lines. Even though the real property tax rate on the Island is only 11 mills and most other cities in

the state levy a higher millage rate on their real property and Appellee had the authority to double its millage rate on real property, Appellee chose not to do that because that would raise the revenue from local businesses and residents, rather than from the tourists.

When Appellee or other governmental units select a tax that is placed on common carriers, rather than upon planes or private boats, that assures the municipality that the burden will be carried to a greater extent by nonresidents because more nonresidents will travel on common carriers.

To allow a municipality to tax the bare privilege of entering and leaving its city limits, under the guise of a "franchise fee", would open Pandora's box. It is a bare privilege because Appellee provides absolutely no benefit in exchange for the fee. If Appellee's method is allowed to stand, all municipalities located on water could designate all boats as ferries and follow Appellee's lead. The next step then would be for municipalities, not located on water, to "franchise" *all* common carriers coming to their city limits. Then the municipality could raise revenue by charging a fee based upon gross receipts of sales of transportation services to passengers coming to or leaving the municipality.

The 1½% fee on gross receipts may not be considered a heavy burden on a ticket to and from Appellee, but there is nothing that limits Appellee to 1½% and there is nothing that assures that the next municipality will not make it 25%. In any event, potentially it is a tax on movement of passengers and freight thoughout the United States without any attempt at apportionment to that part within the City.

If Appellee were to argue that only municipalities located on water could pass an ordinance similar to Appellee's, that would be irrelevant and incorrect. It would be *irrelevant* because the vast number of municipalities in the United States that are located on water make the impact of such approved action a nationwide concern that requires resolution by this Court. Such an argument would be incor-

rect because an ordinance such as Appellee's, if allowed to stand by this Court, would not be restricted to municipalities located on water dealing with boats that carry passengers and personal property. The same rationale would cause municipalities to tax and regulate any type of common carrier arriving or leaving its city limits. Appellee argues that boats that carry passengers and property are unique and therefore local governmental units have special authority to regulate and tax boats. This is not an accurate statement of the law. Boats are treated like all common carriers by all legislation, including the legislation passed pursuant to the Interstate Commerce Clause (see Water Carriers Act discussed under the Federal preemption issue, infra).

Appellee argues that this is not true of ferries. Appellee claims that ferries may be taxed and regulated because ferries are unique privileges. This may be true if one is dealing with a true traditional ferry. Appellee's Ferry Boat Code defines a ferry as any boat used to transport persons or personal property to the Island for pay. This definition would be applicable to every boat for hire in the United States. Nothing is unique about a ferry under that definition. So the Ferry Boat Code covers all boats with no special recognition or classification or treatment of a true ferry as opposed to any boat. This is an important point. A mistake made by each of the Michigan Courts was the failure to distinguish between boats in general and ferries. The State Courts concluded that Appellee could by its own definition make boats and ferries synonymous for all purposes. If ferries truly fall into a unique category that may be regulated and franchised for a fee based upon gross receipts, then boat lines such as Appellants are not ferries. This distinction between boats and ferries is discussed in more detail under the Federal preemption issue of this Jurisdictional Statement and Appellants would refer the Court to that argument for a true definition of a ferry that maybe regulated.

The Michigan Courts all treated the federal questions in a cavalier fashion. The Trial Court barely addressed the interstate commerce issue and did not deal with the other issues other than to simply deny relief. The Michigan Court of Appeals just referred to the issues and pronounced them to be without merit. The Michigan Supreme Court affirmed the Court of Appeals without discussion, even after granting leave, requiring printed briefs and permitting oral arguments.

The tonnage tax issue is addressed first since we are dealing with a community on an island. The subsequent issues on freedom to travel and burden on interstate commerce would apply equally to municipalities on islands or connected by highways rather than waterways.

Tonnage Tax Issue

The franchise fee requirement of Appellee's Ferry Boat Code exacts a fee of 1½% of gross receipts. Appellants and/or their passengers receive nothing in exchange. The docks are privately-owned and Appellee offers no extra services or benefits beyond that already provided to other businesses and the residents of the Island.

A tonnage tax is a tax on the privilege of entering into a port and is not based on any service being rendered. The Constitution of the United States forbids the imposition of a tonnage tax [U.S. Const., Art. I, §10(3)]. This tonnage tax restriction even applies to vessels employed in commerce between ports within the same state as in the case at bar. A duty of tonnage has been defined as a tax for the privilege of entering into a port or of navigating the waters of a state without any service having been rendered by the state for that tax. *Parkersburg & Ohio River Transport Co* v *Parkersburg*, 197 U.S. 691, 2 S. Ct. 732, 27 L. Ed. 584 (1883). *The Parkersburg* Court also distinguished a duty of tonnage (which is unconstitutional) from a wharfage charge (which is constitutional). A duty of tonnage is a charge for the privilege of entering or trading or lying in a port or harbor,

while wharfage is a charge for the use of a wharf. In *Cannon* v *New Orleans*, 87 U.S. (20 Wall) 577, 22 L. Ed. 417 (1874), the U.S. Supreme Court held that an ordinance imposing a wharfage charge on all steam boats which should moor or land in any part of the port violated the tonnage tax restriction. The New Orleans ordinance was broad enough to impose the charge for any landing anywhere within the City limits, not just at wharves constructed and maintained by the City. Now Appellee is attempting to resurrect this ancient discriminatory tax repudiated long ago by this Supreme Court.

If a municipality does not offer wharfage, it might still be able to exact a fee of vessels entering its harbor if the municipality provides services unique to those vessels. Without rendering such services, and without offering wharfage, a municipality cannot exact any fees for entering its harbor. C. Antieau, Commentaries on the Constitution, pp 66-67, citing *Cannon* v *New Orleans*, *supra*, and *Inman Steamship Co.* v *Tinker*, 94 U.S. 238, 24 L. Ed. 118 (1877).

Without rendering services and without offering wharfage, Appellee's fee requirement violates the U.S. Constitution.

It should also be noted that the tonnage tax prohibition applies to *all* taxes levied on vessels for the privilege of entering a harbor if no services or wharfage is provided. The case of *Clyde Mallory Lines* v *Alabama ex rel State Docks Commission*, 296 U.S. 761, 56 S. Ct. 194, 80 L. Ed. 215 (1935), indicates the broad interpretation which the United States Supreme Court has given the tonnage tax provision of the U.S. Constitution. The fact that the City's Ferry Boat Code does not exact a fee strictly computed on the basis of the tonnage of Appellants' vessels does not remove the Ferry Boat Code from the prohibition against tonnage duties. Substance is always taken over form and if a tax is in fact a duty on the privilege of entering into a port, and no service is rendered therefor, the tax is uncon-

stitutional. Actually, in this case, the franchise fee is also directly related to tonnage, because the larger the vessel the greater the cargo (persons or property) and the greater the fee paid to Appellee.

The City's ferry franchise fee requirement is also violative of the tonnage tax provision since it is directed at a vessel engaging in a particular trade. A license fee on a particular trade was held to violate the tonnage tax restriction in *Harmon* v *City of Chicago*, 147 U.S. 396, 13 S. Ct. 306, 37 L. Ed. 216 (1893). Chicago attempted to exact a $25 per boat license fee from the plaintiff for the privilege of navigating the Chicago River with tug boats. The Court noted that the license fee was a tax for the use of navigable waters and not a charge by way of compensation for any special improvement to the Chicago River. No special benefit was given to the tug boats for the license fee. Therefore, the license fee was an unconstitutional tonnage tax. Similarly the Court in *Moran* v *City of New Orleans*, 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884), held that a license fee on tug boats was void.

The fact that Appellants operate their boats entirely within the State of Michigan does not preclude a violation of the tonnage tax prohibition. In *In Re State Tonnage Tax Cases (Mobile Trade Co* v *Lott)*, 79 U.S. (12 Wall) 204, 221, 20 L. Ed. 370, 376 (1871), the U.S. Supreme Court held that the prohibition against levying a tonnage tax extends to vessels employed in commerce between ports and places within the same state.

By not bothering to explain their positions on this issue, the Michigan Courts have apparently assumed that the tonnage tax prohibition of the U.S. Constitution is inconsequential. But the decisions of the State Courts in the instant case are contrary to the above-cited decisions and must be reversed under the tonnage tax provision of the U.S. Constitution until there is a repeal of this clear constitutional mandate. This Court has not addressed the tonnage tax

issue for many years because States and local governments have not attempted to levy a tax on the privilege of vessels entering a harbor, but now this Court must again remind State Courts as this Court had to do in the school segregation cases that they cannot amend or flaunt the provisions of the U.S. Constitution. *Cooper* v *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958).

Appellant Arnold Transit has been operating a boat service to Mackinac Island since the late 1800's. That was during a time when states and local governmental units were attempting to raise revenue by levying a tax upon the privilege of entering a port. Those attempts gave rise to the cases above discussed. That same monster has again raised its head in Appellee's Ferry Boat Code and the U.S. Constitutional provision prohibiting a tonnage tax by local governments is just as necessary now as it has been in the past. Appellants operate presently in three harbors and will continue to operate in at least three harbors. If all three municipal units pass an ordinance similar to Appellee's, then the Constitutional violation will be tripled. The Appellee's Code by itself is unconstitutional and Appellants indicate the multi-harbors traveled by Appellants merely to illustrate one of the reasons for the Constitutional prohibition against a tonnage tax. One burden has a serious enough effect on commerce but multiple fees would destroy commerce. As was stated in *Inman Steamship* v *Tinker*, supra, p 245:

> "Wherever such commerce goes, the power of the nation accompanies it, ready and competent, as afar as possible, to promote its prosperity. . . . The confusion and mischiefs that would ensue if this restriction were removed would be too obvious to require comment."

Freedom to Travel Issue —
Fourteenth Amendment and Commerce Clause

As set forth in the facts, Appellee's City Council wanted to accomplish one goal by the challenged Ferry Boat Code.

Appellee wanted to raise general revenues by charging a fee to people coming to and leaving Mackinac Island. Appellee wanted to "clip the tourists." Appellee contemplated placing turnstiles at the end of the private docks owned by the boat companies but apparantly decided this would be illegal. So Appellee decided the easiest way to charge a fee to the tourists coming to the Island was to charge a fee to the boat companies (Appellants) and let them pass the fee along to the tourists. In an attempt to justify the tax, they called it a franchise fee based upon the gross receipts of the boat companies, but it is a head tax on people entering or leaving the City. The fee is 1½% of the receipts from transporting passengers, their personal property, freight and mail to and from Mackinac Island. For practical purposes everyone other than Island residents come to the Island by Appellants' boats. Certainly no one walks or swims to the City. In a further attempt to legitimize the Ferry Boat Code, the Appellee also included sections that regulate the boat companies' schedules, rates and tariffs.

A fee placed upon a person's right to *travel to or leave* a community whether it be as obvious as a turnstile or as devious as a ferryboat franchise fee is still a head tax, or a fee that is repugnant to the following U.S. Constitutional provisions as demonstrated by the following cases:

1. Implied, if not inherent, right to travel under the Constitution generally, *United States* v *Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966);

2. Privileges and immunities clause of the 14th Amendment, *Shapiro* v *Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Crandall* v *Nevada*, 73 U.S. (6 Wallace) 35, 18 L. Ed. 745 (1868);

3. Commerce clause, *Edwards* v *California*, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 (1941); Cf: *Dean Milk Co.* v *City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951);

4. As a "liberty" protected by the due process guarantees of the 14th Amendment, *Kent* v *Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958).

Further, in *Dean Milk Co., supra*, footnote #4, this Court recognized that it was irrelevant that the same burden was placed on intrastate commerce. This conclusion should be even stronger when dealing with people. Just because the Appellee is placing a burden on Michigan residents coming to the Island does not make the burden placed upon the freedom of travel of non-Michigan residents any more acceptable under the Constitution.

There is no salvation to Appellee's Ferry Boat Code under cases such as *Evansville* v *Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) because Appellee is furnishing no benefit nor providing any facility to the passengers or their personal property, nor is the fee set aside to pay for terminal facilities as in *Evansville* v *Delta, supra*.

Undue Burden on Interstate Commerce Issue

The 1½% gross receipts charge sought to be imposed by the City of Mackinac Island is an unconstitutional burden on interstate and foreign commerce contravening Article I, Section 8, Clause 3 of the U.S. Constitution. Appellants are engaged in interstate commerce by virtue of the passengers and freight they carry and due to the fact that they traverse navigable waters of the United States in transporting these passengers and freight to and from Mackinac Island. Many of Appellant's passengers and a substantial amount of the freight carried by Appellant Arnold Transit have their origins outside the State of Michigan. This places Appellants within the stream of commerce and the gross receipts fee the City seeks to place on Appellants is an undue burden on interstate commerce, since the City provides no benefit which would justify the burden and makes no attempt to apportion the tax to that part of the travel which takes place in the City.

Interstate commerce has been broadly defined since Chief Justice Marshall penned *Gibbons* v *Ogden*, 22 U.S. (9 Wheat) 1, 6 L. Ed. 23 (1824). See also *Heart of Atlanta Motel* v *United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) and *Katzenbach* v *McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964). In the *Heart of Atlanta*, *supra*, this Court stated that if interstate commerce feels the pinch, it does not matter how local the operation is that applies the squeeze.

Appellee has argued that Appellants are not engaged in interstate commerce simply because they travel entirely within the State of Michigan. Appellee's position is erroneous for two reasons.

First, in *Dean Milk Co.*, *supra*, this Court recognized that it is not relevant that a local regulation burdens some intrastate as well as out-of-state producers. Under Appellee's ordinance, a fee must be paid on personal property transported to the Island. Therefore, if a resident of the Island grows tomatoes and sells them or any other produce which originates on the Island, for use on the Island, there is no fee levied by Appellee. However, if that tomato is shipped over by boat (which other than by air is the only commercial method of getting to the Island), there is a fee exacted by Appellee for the shipment, whether it originates in Michigan or outside of Michigan. This violates the Commerce Clause as discussed in *Dean Milk Co.*, *supra*.

Second, the City overlooks the fact that Appellants travel the Great Lakes which are undoubtedly navigable waters used extensively for interstate commerce. In *The Steamer Daniel Ball* v *United States*, 77 U.S. (10 Wall) 557, 19 L. Ed. 999 (1870), this Court held a steamboat which traveled on a river which was entirely within the State of Michigan was engaged in interstate commerce and thus, was subject to the jurisdiction of the Congress.

As with *The Steamer Daniel Ball*, Appellants' boats are employed in transporting goods and passengers destined for

other States, or goods and passengers from without the limits of Michigan and destined for Mackinac Island. Thus, it can be concluded, as it was in *The Steamer Daniel Ball, supra*, that Appellants are engaged in interstate commerce.

In addition, this Court strongly suggested in *Complete Auto Transit Inc. v Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), reh den 430 U.S. 976, 97 S. Ct. 1669, 42 L. Ed. 2d 371 (1977), that if a tax is not fairly related to the benefits provided to the taxpayer or if the tax is not fairly apportioned, then that tax would be an improper infringement on interstate commerce. In the instant case, there are no services provided by the City and yet had the 1½% gross receipts fee been in effect in 1978, it would have resulted in general revenue to Appellee of $36,434 from Appellants.

Further, none of Appellants' routes and only about 10 feet of Appellants' docks are within Appellee's City limits. The whole trip by Appellants' boats is over 6 miles from St. Ignace and 7 miles from Mackinaw City each way. Therefore, 1½% of gross receipts representing the total trip is not proportionate.

As was true of Appellants' tonnage tax argument, the Michigan Appellate Courts did not deign to discuss this interstate commerce issue and instead gave it only summary disposition.

The *Evansville* supra Court distinguished the decision in *Crandall v Nevada, supra*. In *Crandall*, a State statute imposed a $1.00 tax upon every person leaving the State by railroad or stagecoach. This was held to be an impermissible burden upon the Constitutionally protected right to travel. The *Evansville* Court said that *Crandall* applied to passengers traveling interstate by privately-owned transportation without regard to whether the State provided any facilities for the passengers. Thus, a charge designed to make the user of State-provided facilities pay may be constitutionally imposed. Without the State-provided facilities,

however, the charge imposes an undue burden upon interstate commerce.

The *Evansville* Court also held that the amount of the tax must be based upon some fair approximation of the use or privilege for use. In the case now before this Court, the charges are imposed on passengers arriving in the City, leaving the City and on passengers that do not disembark the boats at Mackinac Island. These charges are not designed to defray the cost of construction or the cost of maintenance of municipal ferries, docks or wharves. No municipal ferries, docks, or wharves exist on Mackinac Island. The charges imposed under the Ferry Boat Code are not for the purpose of defraying any benefit which Appellee provides to ferryboat passengers. The truth is that the tourists will gain no specific benefit from the revenue raised by the Ferry Boat Code. Just like the *Crandall, supra*, stagecoach riders, the tourists visiting Mackinac Island gain no benefit from the tax they must bear other than those residents also receive without paying the tax.

Federal Preemption Issue

As previously noted, Appellants are engaged in interstate commerce. The Congress of the United States was entrusted by the U.S. Constitution with the authority over interstate commerce. Furthermore, the Congress has authority over the navigable waters that Appellants travel to and from Mackinac Island. Congress has enacted legislation pursuant to its authority over interstate commerce and navigable waters. The Ferry Boat Code is in conflict with this Federal legislation, thus the Ferry Boat Code must yield.

The basis of the doctrine of Federal preemption is found in the Constitution of the United States, Supremacy Clause, Article VI, §2. The Supremacy Clause coupled with the Commerce Clause (U.S. Const, Art I, §8) preempts the subject legislation of the City of Mackinac Island.

In *Rice* v *Santa Fe Elevator Corp*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1949), Justice Douglas stated that if the legislation is pervasive, Federal interest is dominant, or if state policy may produce an inconsistency, then the Federal legislation preempts the state legislation.

The United States Congress has given the Interstate Commerce Commission the power to regulate the same things which the City of Mackinac Island is now attempting to regulate through the Ferry Boat Code. The Federal Government has demonstrated its intention to dominate this field by passing the Interstate Commerce Act, 49 U.S.C.A. §§902, 906, 909. The Federal intent was to create uniformity in the rates, fares, charges, and classifications imposed by water carriers. This intention will be thwarted if Appellee is also allowed to regulate Appellants' rates, fares, charges and classifications.

Appellee has argued that 49 U.S.C.A. §10544(a)(3), the Revised Interstate Commerce Act, repealed the portion of the Interstate Commerce Act upon which Appellants rely. Appellee argues that the Commission has excluded Appellants from the Commission's jurisdiction because this section specifically excludes ferries. Appellee's argument is faulty in at least two respects. First, the statute which Appellants cite and rely upon, in part, was not repealed until 1978. Therefore, for the purposes of this case, the prior statute must be considered effective since the Ferry Boat Code was passed in 1977, and this present action was commenced in 1977.

Second, analysis of the Revised Interstate Commerce Act reveals that there is no definition of ferry in that statute. Furthermore, of the definitions that are set forth, Appellants meet the definitions of "vessel", "water carrier" and/or "water common carrier" (49 U.S.C.A. §10102(25-27). Therefore, even under the Revised Interstate Commerce Act, Appellants are presumably subject to the jurisdiction of the Interstate Commerce Commission.

In reviewing the definitions set forth in 49 U.S.C.A. §902(c, d, f) and 49 U.S.C.A. §10102(25-27) and exclusions 2, 3, 4 and 5 of 49 USCA §10544(a), it is obvious that under the I.C.C., Appellants are not "ferries." Only within the unique definition of ferries as set forth in Appellee's Ferry Boat Code do Appellants qualify as a ferry. Certainly not for the purposes of the water carrier act under the I.C.C. 49 U.S.C.A. §§10544 sets forth all carriers that are exempt from I.C.C. jurisdiction:

> "(a) Except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out the transportation policy of section 10101 of this title, the Commission does not have jurisdiction under this subchapter over transportation by water carrier when the transportation is provided—
>
> (1) entirely in one harbor or between places in contiguous harbors, other than transportation under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the limits of the harbor or the contiguous harbors:
>
> (2) by a vessel of not more than 100 tons carrying capacity or 100 indicated horsepower;
>
> (3) by a vessel carrying only passengers equipped to carry not more than 16 passengers;
>
> (4) by a ferry;
>
> (5) by a water carrier transporting equipment of contractors used, or to be used, in construction or repair for the water carrier; or
>
> (6) to carry out salvage operations."

If ferry is as defined in Appellee's Ferry Boat Code, then the Commission would not have needed to insert the other exemptions covered by subparagraphs (1), (2), (4), (5) and (6). The Commission certainly would not have had to exempt (3) a vessel carrying only passengers and equipped to carry not more than 16 passengers.

Appellee has argued that a boat line cannot be operated without a franchise and therefore Appellee could franchise Appellants. Appellants have argued that if that statement is true, it is only applicable to ferries as included within the "traditional ferry" definition and not Appellee's broad definition. The Interstate Commerce Commission meant ferry within its traditional meaning or the other categories of exemption would have been unnecessary. "Ferries" operate much differently then do Appellants' boat lines. The original ferries, or, as they were referred to in English Common Law, ancient ferries, were flat barges which connected the royal highway on one side of a stream with the royal highway on the other side. Ancient ferries traveled along a fixed rope or cable and were human or animal powered. There was only one ferry per roadway and the ferry had to be available at any time to anyone who sought to cross the stream and continue along the royal highway. Cases which set forth the above characteristics of ferries are: *Letton* v *Goodden*, L.R. 2 Eq. 123; 35 L.J. Ch. 427; 14 L.T. 296; 30 J.P. 677; 14 W.R. 554; 44 L.J.R. 427 (1866). *The North and South Shields Ferry Co* v *Barker*, 2 Ex. Ch. 136; 154 Eng. Rep. 437 (2 Ex. 1848). *Huzzey* v *Field*, 2 Cr. M. R. 432; 150 Eng. Rep. 186 (Ex. 1835). *Newton* v *Cubitt*, 12 C.B.N.A. 32; 1 New. Rep. 400; 31 L.J.C.P. 246; 6 L.T. 860; aff'd 13 C.B.N.A. 864 Ex. Ch.; 142 Eng. Rep. 1053 (Ex. Ch. 1862). *Hammerton* v *Earl Dysart*, 1 A.C. 57; 113 L.T.R. (ns) 1032 (1916).

The above cases established the following characteristics of ferries (as opposed to boat lines for hire): exclusivity, a continuation of a highway, a connection with a public right of way in exchange for public obligations regarding facilities, non-discrimination, availability, and perpetuity.

Once the characteristics of traditional ferry franchises are compared to the boats operated by Appellants, it can be determined that Appellants' boats are not ferries and Appellants are under the jurisdiction of the Interstate Commerce Commission. First, Appellants do not transport passengers and goods from where the public highway ends to where it

resumes on the other side. They transport them from their private property on one side to their private property on Mackinac Island. Second, Appellants do not operate or exist in connection with a right of way. Third, none of Appellants have received, have been offered, nor can they receive from the City an exclusive right to carry passengers and goods to Mackinac Island.

This Court recognized the exclusivity of ferry franchises in *Conway* v *Taylor's Executor*, 66 U.S. (1 Black) 603, 634, 17 L. Ed. 191 (1861).

> "The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist."

Appellee has claimed that ferries are franchises. However, as this Court has recognized, franchises must be exclusive.

The Michigan Courts did not deal with whether Appellants were ferries, they assumed they were and then required a franchise. The Michigan Court of Appeals in so holding quoted from the U.S. Supreme Court case of *Louisville and Jeffersonville Ferry Co* v *Kentucky*, 188 U.S. 385, 394-395, 23 S. Ct. 463, 47 L. Ed. 513 (1902).

The U.S. Supreme Court in the *Louisville* case, *supra*, did not have to resolve the issue of what is a ferry franchise in order to decide the case, but the court indicated that it was relying on Kent's Commentaries for a definition of ferry franchises. The language that the U.S. Supreme Court attributed to Kent in *Louisville*, *supra*, and the language the Michigan Court of Appeals quoted in its Opinion in the instant case did not set forth Kent's complete definition of a ferry franchise. In his Commentaries on American Law, Vol. III (1884), pp 653-654, James Kent's complete definition of a ferry franchise is found to be consistent with the definition of ferry franchise gleaned from the common law.

Additional support for Federal preemption is drawn from the fact that Appellants traverse navigable waters. The routes of Appellants are to and from the City of Mackinac

Island, and to and from St. Ignace and the Village of Mackinaw City. While traveling these routes, the ferries are traveling the waters of Lake Huron, and, more specifically, within the Straits of Mackinac. McQuillin states that:

> "Navigable waters are primarily under the control of the government of the United States. . ." 3 McQuillin, Municipal Corporations, (3d ed) §11.08, p 14.

Since the Federal Government controls the waters on which Appellants travel, the City's attempt to regulate Appellants' use of those waters is contrary to that control. Therefore, the Ferry Boat Code must yield to the authority of the Federal Government.

In *The Steamer Daniel Ball, supra*, the U.S. Supreme Court found that navigable waters which with other waters formed a continuous highway over which interstate and/or international commerce could be conducted were under the direct control of Congress. There is no doubt that the Straits of Mackinac join with other navigable waters to form such a continuous highway. The U.S. Congress has control over those waters and the City through its proposed Ferry Boat Code would be infringing upon Congress' power.

Federal preemption should be an issue of vital concern to this Court. Citizens and businesses should not be placed in positions where they are subject to potentially nonuniform regulations imposed by different governmental entities. In areas where the federal government has indicated its interest such as in interstate commerce and in the navigable waters of the U.S., that interest should preclude any attempts to usurp it or conflict with it by state or local governments. If the Appellee has authority to regulate Appellants, then so do the other two ports that Appellants enter and leave. If Appellee's Code is upheld, the other two cities will be right behind. Chaos would develop if either of the other ports required different schedules, rates or tariffs than those required by Appellee. What would Appellants do if Appellee required the last boat

of the day to leave Mackinac Island at 8:00 p.m. and one of the other cities required them to leave Mackinac Island at 11:00 p.m.? This is just one of many examples why the U.S. government has preempted this field. This question certainly merits serious consideration not the cavalier treatment given it by the Michigan Courts.

Denial of Equal Protection and Due Process Issue

Appellee by imposing its "franchise fee" against the gross receipts of just the boat companies has discriminated against Appellants in two regards.

As this Court recognized in *Western & Southern Life Ins. Co.* v *State Board*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981), if there is "no rational relation to a legitimate purpose", then there is a lack of equal protection. In essence this is a recognition by this Court of the fact that if there is no reasonable relationship between the burden of the tax and the taxing authority, then this constitutes a lack of equal protection. Because in the present case the City of Mackinac Island is taxing the receipts for the whole trip, to and from the Island, 99 plus % of which is outside the city limits, there simply is no rational relation to a legitimate purpose of the City.

Second, carriers other than boats, i.e. airplanes, which transport people or personal property to the island do not have to pay a percentage of their gross receipts to Appellee.

Third, there are numerous businesses located on the Island catering to essentially the same clientele, yet Appellants are the only business that pays a fee of 1½% of its gross receipts in order to be permitted to continue to operate. The Appellants would have paid $36,000 to Appellee during 1978, based on 1½% of gross receipts.

The arbitrary selection of just the boat companies cannot be justified. Forcing the boat owners to pay a "franchise fee" of 1½% of their gross receipts is a subterfuge to shield the air carriers and the other businesses and residents on the island, while unduly burdening the boat lines. There

was no legitimate aim in the Ferry Boat Code legislation. It was passed solely to raise revenue and the classification of boat owners to raise the revenue is arbitrary, without reasonable basis and a denial of equal protection. *Covington and Lexington Turnpike Road Co.* v *Sanford*, 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1898); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 420, 14 S. Ct. 1062, 38 L. Ed. 1031 (1894).

Closely related to the commerce clause issue, under due process the Appellee does not even meet the bare minimum requirements because of the absolute minimum relationship. This is not unlike the single factor formula cases. *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 5 S. Ct. 385, 75 L. Ed. 879 (1925); *Norfolk & Western R. R. Co.* v *State Tax Comm*, 390 U.S. 317, 88 S. Ct. 995, 19 L. Ed. 2d 1201 (1968). Those cases were reviewed with approval by this Court in *Moorman Manufacturing Company* v *Bair*, 437 U.S. 267, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978).

Unlike *Moorman*, *supra*, there was no opportunity to show before the City Council or any other state agency that as applied to Appellants' boat companies the tax was so unfair as to lack due process because no attempt at apportionment of any kind was made, as Justice Stevens suggested in the *Moorman* opinion. There was an absolute failure of apportionment and a seizure on activities almost completely outside the municipality.

In addition, in order for the City to exact a revenue producing fee it must provide Appellants a right to use public property in a fashion not enjoyed by the public at large, i.e. a use of public rights of way to the exclusion of the public. This is demonstrated by a trolley or utility being permitted to lay its tracks, lines or pipes in the public right of way and paying a fee for said privilege. The Michigan Courts held that a ferry is by definition a franchise; therefore, in and of itself a property right.

What the Appellee is offering Appellants' is not within the definition of a "ferry" as that definition has been

recognized to be a property right. Thus, Appellee is not providing Appellants with a property right. Since Appellee is providing no property right to Appellants, the franchise fee of 1½% of gross receipts, rather than a nominal license fee, amounts to the taking of Appellants' property without just compensation in direct violation of the due process clause of the Fourteenth Amendment.

Conclusion

WHEREFORE, Appellants respectfully request this Honorable Court to recognize the far reaching effects of this new and illegal method that Appellee has devised to tax the people and property entering and leaving its city limits. Appellants request this Honorable Supreme Court to summarily reverse the holding of the Michigan Supreme Court and strike down Appellee's Ferry Boat Code; or, grant Appellants the right to submit a brief on the merits and an oral argument on these very important constitutional questions.

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DATED: May 9, 1983

ON APPEAL FROM THE
SUPREME COURT OF MICHIGAN

APPELLANTS' APPENDIX

ORDER AFFIRMING COURT OF APPEALS
(Filed: Dec. 22, 1982)

STATE OF MICHIGAN
SUPREME COURT

ARNOLD TRANSIT COMPANY, a MICHIGAN CORPORATION, ET AL.,
Plaintiffs-Appellants,
Cross-Appellees,

v

No. 65982

THE CITY OF MACKINAC ISLAND, a Charter City, incorporated pursuant to Local Acts 1899-No. 437,
Defendant-Appellee,
Cross-Appellant.

Except Fitzgerald, C.J. and Williams and Riley, JJ. PER CURIAM

After full consideration of the record, briefs, and argument of the parties, we are not persuaded of any error in the disposition of this matter by the Court of Appeals.

Affirmed. No costs, a public question.

(s) Mary S. Coleman
(s) James L. Ryan
(s) Charles L. Levin
(s) Thomas Giles Kavanagh

ORDER DENYING MOTION FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of February in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
Associate Justices.

Rehearing No. 78

ARNOLD TRANSIT COMPANY, INC., a Michigan corporation, et al.
Plaintiffs-Appellants,

v

THE CITY OF MACKINAC ISLAND, a charter city, incorporated pursuant to Local Acts 1899, No. 437,
Defendant-Appellee.

SC: 65982
CoA: 78-4743
LC: 77-1064-CZ

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

The motion to waive the requirement that the motion for rehearing be printed is granted.

Williams, C.J., not participating.

Order Denying Motion for Rehearing

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of February in the year of our Lord one thousand nine hundred and eighty three.

(s) Corbin R. Davis
Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

ARNOLD TRANSIT COMPANY, a Michigan corporation; STRAITS TRANSIT COMPANY, a Michigan corporation; SHEPLER'S INCORPORATED, a Michigan corporation; and ARGOSY BOAT LINE INCORPORATED, a Michigan corporation,
Plaintiffs-Appellants, Cross-Appellees,

v

No. 78-4743

THE CITY OF MACKINAC ISLAND, a Charter City, incorporated pursuant to Local Acts 1899—No. 437,
Defendant-Appellee, Cross-Appellant.

OPINION OF COURT OF APPEALS
(Filed: August 11, 1980)

BEFORE: Beasley, P.J., and Holbrook, Jr. and R.E. Robinson, JJ. ROBINSON, J.*

Plaintiffs appeal from a partial summary judgment and judgment following a bench trial upholding the validity of the City of Mackinac Island Ferry Boat Code.

Argosy Boat Line Incorporated is no longer a party to this appeal, having terminated its operations. The other plaintiffs operate ferry boats between the City of St. Ignace and the City of Mackinac Island and the Village of Mackinac City and the City of Mackinac Island.

Plaintiffs' suit challenges the validity of the Ferry Boat Code, adopted by defendant on June 29, 1977, which, among other things, imposes a fee based upon one and

* Circuit Judge sitting on the Court of Appeals by assignment.

one-half percent of the gross receipts of each ferry boat operator; regulates the schedules, rates, tariffs and safety standards of each operator; and imposes criminal sanctions, including a $500 per day find for violation of the ordinance. Plaintiffs' challenge raises a variety of issues.

I. DOES DEFENDANT CITY HAVE POWER TO ENACT A FERRY BOAT CODE PROHIBITING THE OPERATION OF PLAINTIFFS' BOATS WITHOUT A FRANCHISE?

We think it does.

None of the parties quarrel with the rule that state government has the exclusive power to franchise ferry boat operators. 12 McQuillan, Municipal Corporations (3rd ed), § 34.14, p 45. Nor do they quarrel with the rule that a municipality may acquire this power by delegation from the state. *City of Niles* v *Gas & Electric Co.* 273 Mich 255, 265; 262 NW2d 900 (1935).

The parties also agree that if defendant is to have the authority to collect monies in excess of those required to regulate the ferry boat operation, such authority must be derived from its authority to franchise.

At this point, agreement ends, plaintiffs contending that defendant does not have the power to franchise ferry boat operations and defendant contending that it does.

The ability of the grantor of a franchise to exact from the franchisee more than the cost of regulating the operation stems from the fact that a franchise is a right (sometimes referred to even as a property right) granted for a consideration.

> "Kent says that the privilege of establishing a ferry and taking tolls for the use of the same is a franchise and that an estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants

of a right or privilege for an adequate consideration". *Louisville & Jeffersonville Ferry Co* v *Kentucky*, 188 US 385, 47 L Ed 513 (1902), quoting from 3 Kent, Com 458, 459.

Defendant claims its authority to franchise from the following legislative delegation in its City Charter:

"Sec. 1. Said City of Mackinac Island shall, in addition to such other powers as are herein conferred, have the general powers and authority in this chapter mentioned; and the council may pass such ordinances in relation thereto and for the exercise of the same, as they may deem proper, namely:

"Thirteenth, to establish or authorize, license and regulate ferries to and from the city, or any place therein, or from one part of the city to another, and to regulate and prescribe from time to time the charges and prices for the transportation of persons and property thereon; [1899 LA 437, Chapter IX]."

Plaintiffs reply that since municipal powers must be narrowly construed and that power cannot be inferred where the legislature has not specifically bestowed such power, the failure of the legislature to use the magic word "franchise" leaves defendant without such power. While we do not concede the validity of the narrow construction view espoused by plaintiffs, their argument overlooks the fact that a ferry is by definition a franchise:

"A ferry is a right or franchise . . .", 3 McQuillin, Municipal Corporations 27 (3rd ed).

"Ferry . . . In law it is treated as a franchise . . ." Black's Law Dictionary, p 747 (4th ed).

"Now what is a ferry? It is a species of franchise . . ." *Chilvers* v *The People*, 11 Mich 42, 52 (1862).

Moreover, "establish" and "authorize" have been used interchangeably with franchise.

"... the privilege of establishing a ferry and taking tolls for the use of the same is a franchise ..." *Louisville & Jeffersonville Ferry Co* v *Kentucky, supra.*

"The right or privilege to establish and operate a public ferry is a franchise." 35 Am Jur 2d, *Ferries*, § 6.

"No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature. ... These are franchises ..." *California* v *Central Pacific Railroad*, 127 US 1; 32 L Ed 150 (1887).

And in *Chilvers* v *The People, supra*, our Supreme Court found that a charter provision giving the City of Detroit the power to license ferries and "to prescribe the sum of money to be paid therefor into the treasury of the corporation," 11 Mich at 49, gave the city the power to franchise ferries and to make such licenses a source of revenue for the city. The Court apparently found that the granting of the power to license along with the power to assess payment for such license amounted to the granting of the power to franchise. Compare such language with the provisions of § 1, Chapter XVI of defendant's charter:

"Sec. 1. The council of said city may regulate and license ferries from such city or any place of landing therein to the opposite shore, or from one part of the city to another; and may require the payment of such reasonable sum for such license as to the council shall seem proper ..." (1899 LA 437, Chapter XVI).

It is apparent from a reading of the cases that whether a municipality may derive revenue from the granting to an individual of the right to do something turns not so much upon using the magic word among license, authorize, establish, franchise, etc., as it does upon the subject of the grant, those grants of rights which are peculiarly in the public domain, such as public utilities, highways, bridges and

ferries, being considered grants of rights at least approaching property rights for which a consideration can be exacted.

We find no merit in plaintiffs' contention that their ferry boats have no contact with defendant's mainland since they dock at terminals owned by plaintiffs. This argument overlooks the fact that the terminals do not rest in a vacuum but are firmly attached to defendant's mainland.

While defendant failed to include in the purpose of its Ferry Boat Code the raising of revenue, its validity has not been attacked on that ground, probably because Michigan does not hold ordinances to the same exacting one-object requirement as it does its statutes. Nor has any one been misled by the defendant's dereliction in this regard since it has been clear from the outset that all parties considered the power of defendant to raise revenue by means of this ordinance as the critical issue to be presented to the courts.

II. DID DEFENDANT COUNCIL VIOLATE THE REQUIREMENTS OF THE OPEN MEETINGS ACT PRIOR TO ADOPTION OF THE FERRY BOAT CODE?

We think not.

The pertinent sections of the Act are:

"Section 2(b). 'Meeting' means the convening a public body for the purpose of deliberating toward or rendering a decision on a public policy." (MCL 15.262(b); MSA 4.1800(12)(b).

"Section 3(3). All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public . . ." (MCL 15.263(3); MSA 4.1800(13)(3).

"Section 4(b). A public notice for a public body shall always be posted at its principal office and any

other locations considered appropriate by the public body". (MCL 15.264(b); MSA 4.1800(14)(b).

"Section 5(1). A meeting of a public body shall not be held unless public notice is given as provided in this section . . ." (MCL 15.265(1); MSA 4.1800(15)(1).

"Section 5(4). For a rescheduled regular or a special meeting of a public body, a public notice stating the date, time and place of the meeting shall be posted at least 18 hours before the meeting. The requirement of 18 hours notice shall not apply to special meetings of subcommittees of a public body . . . ." (MCL 15.265(4); MSA 4.1800(15)(4).

"Section 9(1). Each public body shall keep minutes of each meeting . . ." MCL 15.269(1); MSA 4.1800(19)(1).

"Section 10(2). A decision made by a public body may be invalidated if the public body has not complied with the requirements of Section 3 . . . (3) in making the decision or if failure to give notice in accordance with Section 5 has interfered with substantial compliance with Section 3 . . . (3) and the court finds that the noncompliance or failure has impaired the rights of the public under this act". (MCL 15.270(2); MSA 4.1800(20)(2).

A chronology of events leading to adoption of the Ferry Boat Code is a necessary preliminary to a discussion of this issue.

On March 30, 1977, defendant's clerk wrote plaintiffs inviting them to discuss with defendant its proposal to levy a "franchise license fee" upon plaintiffs' boats.

On May 25, 1977, defendant's council met in regular session and discussed the proposed code. Plaintiffs were sent notice of this meeting.

On June 22, 1977, defendant's council met in regular session and discussed the proposed code. Representatives of plaintiffs were present.

On June 27, 1977, a special meeting was held at which all members of the council were present, the purpose of the meeting being a discussion of the code. No representatives of plaintiffs were present at this meeting. The purpose of this meeting, its date, time and place, were announced at the meeting on June 22.

On June 29, 1977, a regular meeting of defendant's council was held and the Ferry Boat Code was adopted.

Plaintiffs, pursuant to Sec. 10(2), challenge the validity of defendant's action in adopting the code at its June 29th meeting, for (1) failure of defendant to post notice of the June 27th meeting as required by Sec. 5(1)(4) and Sec. 3(3); and (2) failure of defendant council to keep minutes of the June 27th meeting.

The Open Meetings Act is a relatively new law in Michigan, consequently no body of case law has developed as a guide to its application. However, its short title and its expressed purpose make clear that the act is designed to require public bodies to open their meetings to the public, with notice required to that end.

It appears that defendant clearly violated the technical requirements of the Open Meetings Act by failing to post notice of the June 27th meeting at the City Hall 18 hours in advance, and by failing to keep minutes of the meeting—at which deliberations were held directed toward adoption of a Ferry Boat Code.

Defendant attempts to justify this dereliction by calling the June 27th meeting a meeting of a "committee of committees", presumably another term for committee of the whole, since all of the council members were present. To permit this, however, would make it too easy for a public

body to avoid the act by conveniently labeling its meetings "committee of committees".

Nevertheless, it does not appear that there was any desire by defendant to conduct their meeting out of public sight or that they in fact did so. From the beginning of their deliberations in March 1977, they, with one exception, observed the notice requirements of the Act; they invited input from plaintiffs, they sent plaintiffs notices not required by the Act; at their June 22nd meeting which was attended by plaintiffs, they announced the time, place and purpose of the June 27th meeting. Although apparently not requested by defendant, the date, time and place of the meeting was published two full days before June 27 in the Town Crier, a weekly newspaper having general circulation in defendant city. The meeting was open to the public and was attended by a newspaper reporter. From the trial testimony, it is apparent that had notice been posted at City Hall pursuant to statute, none of the plaintiffs' representatives would have seen it.

The Texas Court of Appeals, examining a notice requirement similar to Michigan's appearing in Texas' Open Meetings Law, found that notice posted 34 hours prior to meeting when 72 hours was required, was substantial compliance with the statute.

> "Even though provisions of the statute are mandatory, we hold that the 'notice' provisions of the statute are subject to the substantial compliance rule . . . the rationale of the substantial compliance rule is that while the notice provisions and statutes are mandatory, they are essentially procedural; that rigid adherence to such a procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the purpose for which the mandate was incorporated in the statute." (p 713). *Stelzer* v *Huddleston*, 526 SW 2d 710, Texas Court of Appeals (1975).

Likewise do we find substantial compliance here.

Plaintiffs additionally complain that the Code must fail because defendant council failed to keep minutes at the June 27th meeting, contrary to Section 9(1). This is not a reason, under Section 10(2), for invalidating the ordinance.

III.

We have carefully reviewed plaintiffs' other allegations of error and conclude that they are without merit.

IV.

The City of Mackinac Island cross-appeals claiming that it should be granted a money judgment in the amount of the franchise fees owed from the effective date of the Ferry Boat Code, July 19, 1977. At the conclusion of the proceedings below, the City prepared a final order for the consideration of the trial court purportedly effectuating the court's opinion. However, the City unilaterally inserted language ordering plaintiffs to submit the information necessary to calculate the retroactive fees and indicating that upon calculation, a money judgment will be entered. The trial court struck this language from the order.

We conclude that defendant is not entitled to the relief sought. This is a suit for declaratory relief in which plaintiffs challenge the validity of the Ferry Boat Code. Defendant has prevailed in full because the Ferry Boat Code has been upheld. Since there was no cross-complaint filed below, defendant is not entitled to affirmative relief in this proceeding. Therefore, defendant's cross-appeal is hereby DISMISSED.

AFFIRMED. No costs, a public question being involved.

STATE OF MICHIGAN
COURT OF APPEALS

ORDER DENYING APPLICATION FOR REHEARING
(Filed: September 22, 1980)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Twenty-Second day of September, in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable
WILLIAM R. BEASLEY
Presiding Judge
DONALD E. HOLBROOK, JR.
RICHARD E. ROBINSON
Judges

ARNOLD TRANSIT COMPANY, a Michigan corporation, et al,
Plaintiffs-Appellants,

-vs-

THE CITY OF MACKINAC ISLAND, a Charter City, incorporated pursuant to Local Acts 1899-No. 437,
Defendant-Appellee.

No. 78-4743
L.C. # 77-1064-CZ

In this cause, an application for rehearing has been filed by plaintiffs-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same hereby is DENIED.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 24th day of September in the year of our Lord one thousand nine hundred and eighty.

(s) RONALD L. DZIERBICKI
Clerk

STATE OF MICHIGAN
MACKINAC COUNTY CIRCUIT COURT

JUDGMENT AND FINAL ORDER
(Filed: October 26, 1978)

At a session of said Court held in the Circuit Court Rooms, Mackinac County, St. Ignace, Michigan, this 20 day of October, 1978.

PRESENT: Honorable Martin B. Breighner,
Circuit Judge

This cause having come on to be heard by this Court partially upon a Motion for Rehearing and partially upon a bench trial; this Court having considered said Motion and having heard the evidence presented by both parties at trial; this Court having made findings of fact; this Court having considered the arguments and briefs of counsel submitted in connection therewith; and this Court otherwise being fully informed in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Rehearing of the matters decided by the Court in its opinion of May 12, 1978, and in its Order of June 9, 1978, is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a final judgment, together with costs, is entered in favor of the Defendant City of Mackinac Island and against the Plaintiffs on all claims, in accordance with the Court's written opinion of September 26, 1978. The Defendant City of Mackinac Island's Ferry Boat Code is valid and enforceable.

(s) MARTIN B. BREIGHNER, CIRCUIT JUDGE

STATE OF MICHIGAN
MACKINAC COUNTY CIRCUIT COURT

DECISION OF THE COURT
(Filed: September 26, 1978)

By decision dated May 12, 1978, this Court granted partial summary judgment to Defendant (City of Mackinac Island), thereby disposing of several issues presented by the pleadings. Plaintiffs (Ferry Boat Operators or FBO) have moved for rehearing as to those issues disposed of by the Court's partial summary judgment. This Court, after considering the Motion for Rehearing and the briefs submitted in connection therewith, concludes that there exists no reason for a rehearing and the same is denied.

With regard to those issues unresolved by the Court's partial summary judgment, a bench trial was conducted on August 31, 1978. The proofs adduced at such trial, supplemented by a stipulated statement of facts dated August 25, 1978, generated for the Court's resolution several issues framed by the pleadings: (a) Did the City of Mackinac Island violate the provisions of the Open Meetings Act, MCLA 15.261 et seq., rendering the adoption of the Ferry Boat Code (FBC) invalid?; (b) Did the FBO acquire prescriptive rights with the FBC, adopted on June 29, 1977, seeks to violate?; and, (c) Does insufficient nexus, denial of due process and unlawful burden on interstate commerce, or any one of these claims, defeat the FBC?

FINDINGS OF FACT—
OPEN MEETINGS ACT

On March 30, 1977, the City Clerk sent each of Plaintiffs a letter, informing them of the City Council's interest in considering the feasibility of a FBC. Plaintiffs were personally notified of and invited to attend the City Council meeting held on May 25, 1977, at which meeting the FBC was first introduced. The proposed FBC was further discus-

sed at a regular meeting of the council on June 8, 1977. It was also reviewed and discussed at a special council meeting on June 14, 1977. No action was taken on June 22, 1977, regarding the adoption of the proposed FBC, even though it was contemplated that action would be taken at that meeting.

An informal meeting (described by council members as a committee of the committee meeting) was held on June 27, 1977, to review a proposed revision in the FBC. At a regular meeting of the council held on June 29, 1977, the FBC was adopted by the Council with a quorum present and by an unanimous vote of all of the council members elected. Each of Plaintiffs received a letter dated June 20, 1977, advising them that the City Council would consider for adoption a proposed FBC at its June 29, 1977, meeting. The Ordinance was recorded by the Clerk of the Council in the "Record of Ordinances" and was signed by the mayor and the clerk. The Ordinance was published in its entirety on July 2, 1977, in a newspaper published within the City of Mackinac Island. Immediately after such publication the Clerk signed and entered upon the "Record of Ordinances" a certificate stating the newspaper and the date of publication.

Meetings of the City Council for the City of Mackinac Island held on May 25, 1977, June 8, 1977, June 14, 1977, June 22, 1977, and June 29, 1977, complied with all of the requirements of the Open Meetings Act. Proper notice was given, FBO had actual notice of such meetings and representatives of the FBO attended most of these meetings. These meetings were open to the public. Members of the public and the FBO were given an opportunity to address the Council. The FBC was adopted by the Council at their meeting held on June 29, 1977.

The City Council met in informal session on June 27, 1977, for the purpose of reviewing a revised draft of the proposed FBC. No minutes were kept at this meeting, the FBO did not have actual notice of the meeting and did not

attend the meeting. No effort was made to exclude members of the public from this meeting. The meeting was held for the purpose of educating council members as to the revised draft of the FBC. The Council did not deliberate toward or render a decision at the meeting in connection with the proposed adoption of the FBC.

The informal session of the Council, held on June 27, 1977, was in fact, open to the public. A representative from the local newspaper did attend the meeting. There was no intent on the part of the City to make such meeting secret. The meeting was held at the regular meeting place for the Council, the council chambers. At the Council meeting on June 22, 1977, a public announcement was made with regard to the meeting to be held on June 27, 1977. Members of the FBO in attendance at the June 22, 1977, meeting did not hear the announcement. The Council's plans to hold the June 27th meeting were published in the Town Crier, a newspaper circulated on Mackinac Island, three days prior to the meeting date. Some of the representatives of the FBO subscribe to the Town Crier.

CONCLUSIONS OF LAW— OPEN MEETING ACT

With the exception of the meeting held on June 27, 1977, the Court concludes that all of the meetings held by the City Council, at which the FBC was considered, were held in compliance with the requirements of the Open Meetings Act.

With regard to the meeting of June 27, 1977, notice was not given as provided in MCLA 15.264 and 15.265. Minutes were not kept as required by MCLA 15.267 and 15.269. The FBO did not know of the meeting and did not attend the same.

The Court concludes, however, that compliance with the requirements of the Open Meetings Act were not re-

quired with respect to this meeting. Since no council action was taken at this meeting, there is no council action to invalidate pursuant to MCLA 15.270. The meeting was an informal meeting held only for the purpose of reviewing a revision of the proposed FBC. No vote was taken at the meeting. Compliance with the Act was not required since no "meeting" was held by the council within the definition of MCLA 15.262(b) and no decision was made at that time as defined by MCLA 15.262(d).

Assuming, arguendo, the requirements of the Open Meetings Act applied to the meeting held on June 27, 1977, (this Court considers the Act did not apply), action taken at at that meeting is not invalid (it does not affect the validity of the FBC) for the following reasons:

(a) The Court finds noncompliance and failure to meet the demands of the Act did not impair the rights of the public under the Act. MCLA 15.270(2).

(b) There was deviation from the Open Meetings Act in one material respect — to-wit: failure to post notice at least eighteen hours before the meeting, stating the date, time and place of the meeting. The question of what constitutes sufficient notice under the Act has not heretofore been considered by the courts of the State of Michigan. The Court concludes there was substantial compliance with notice requirements. At the June 22nd meeting the council announced its plans to hold a meeting on June 27th. Publication of the meeting was made in the local newspaper. The meeting was held in the council chambers. Members of the public were not prevented from participating in the meeting and at least one member of the public was present. This Court believes that substantial compliance with the notice requirements adequately satisfies the intent of the Statute as related to the facts of this case. *Stelzer* v *Huddleston*, 526 SW2d 710 (Texas Court of Appeals, 1975).

FINDINGS OF FACT— PRESCRIPTIVE RIGHTS

The Court incorporates, by reference, pages one through three of the Stipulated Statement of Facts Not in Dispute, dated August 25, 1978.

CONCLUSIONS OF LAW— PRESCRIPTIVE RIGHTS

The issue before the Court is whether FBO acquired rights, because of the operation of a ferry boat service to Mackinac Island prior to the adoption of the FBC in 1977, and whether such rights, if acquired, preclude the enforcement of the FBC.

There is no dispute that a ferry boat service has been provided by the FBO for a substantial period of time prior to 1977 and is continuing to the present time.

A theory of prescriptive rights appears to have been recognized in several old cases outside of the State of Michigan. Some of these cases are as follows: *Milton* v *Haden*, 32 Ala 30 (1858); *Graham* v *Caperton*, 176 Ala 116 (1912); *Williams* v *Turner*, 7 Ga 348 (1849); *Harrison* v *Young*, 9 Ga 359 (1851); *City of Laredo* v *Martin*, 52 Tex 548 (1878).

An investigation of Michigan law establishes that this question has not been decided in this State. Further, the Court has not been furnished with any recent decision from jurisdictions outside the State of Michigan dealing with this question. Also, the Court has not been given, or reference made, by either party, to a discussion of applicable principles in a text, law review article or other legal publication to assist in evaluating the basis and rationale of such doctrine as applied to the instant facts.

In this case, the City of Mackinac Island is not attempting to exclude the FBO from continuing to operate ferries. Rather, the City is extending to them a franchise pursuant

to authority given it by Charter to continue what has been done in the past, but for a price — a franchise fee. This is the crux of the matter — the FBO do not want to pay the fee.

The Court has already found such fee to be authorized and proper. See Decision Granting Partial Summary Judgment, dated May 12, 1978.

Words and Phrases, Prescription, in Speaking of Prescriptive Rights states:

> "The theory of prescription is grounded upon the presumption of a grant having been made, so that if it can be shown that no grant was made, or if it can be shown to be very improbable that a grant was made, the presumption cannot arise and the title by prescription fails." (pp 631-632).

The record before the Court does not establish that the City did, in fact, grant a franchise to FBO sometime in the past. Absent such proofs, the presumption as to prescriptive rights does not exist.

Further, it cannot be reasonably presumed that the City made such a grant based upon the operation of the ferry boat service over many years. The record demonstrates the City did not know it had the power to franchise. The power to franchise was first discovered by the City when it undertook an investigation of possible ways to raise revenue to finance public expenses made necessary by the large influx of people delivered to Mackinac Island by the FBO.

This Court concludes that this doctrine, if it exists at all in the State of Michigan, as applied to the operation of ferries, ought not to be applied to the facts of this case.

The claim advanced by the FBO is essentially one of estoppel against the City of Mackinac Island. They assert that because the City failed to exercise its authority to

franchise ferries in the past, it is prevented or estopped from doing so now.

The general rule in Michigan is that a municipality or other local governmental unit cannot be estopped when exercising its governmental functions (MLP Estoppel, Sections 12 and 13). *Township of Bangor* v *Bay City Traction & Election Co.*, 147 Mich 165 (1907).

The City of Mackinac Island is not seeking to oust the FBO from their ferry businesses, but merely to require the franchise and the payment of a fee therefore.

Other elements of estoppel are not present here.

"Estoppel is not applied against local governments when the other party fails to establish false representations or concealments by the local government." (Municipal Corporation Law, 16 A. 02).

"If, under all of the circumstances, the acts of the public body have created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done, the doctrine of estoppel would be applied to the municipality." (Municipal Corporation Law, 16 A. 02).

This Court concludes that none of the elements of estoppel exist here and finds that it would not be inequitable or unjust to permit the City of Mackinac Island to now exercise that authority which its charter grants.

FINDINGS OF FACT — NEXUS, VIOLATIONS OF DUE PROCESS AND UNLAWFUL BURDEN ON INTERSTATE COMMERCE

With respect to the issues set forth in the caption above, the Court incorporates all relevant findings of fact which appear in the Stipulated Statement of Facts Not in Dispute, dated August 25, 1978.

CONCLUSIONS OF LAW — NEXUS, VIOLATIONS OF DUE PROCESS AND UNLAWFUL BURDEN ON INTERSTATE COMMERCE

This Court is not able to identify the concepts implicit in the FBO claim of lack of a sufficient nexus to permit the City to adopt the FBC. It is the conclusion of the Court that the FBO are combining several of their other claims in the contention that an insufficient nexus exists. As the Court views this argument, it is a restatement of the argument of FBO that the City lacks power to franchise and charge a fee therefore.

To the extent the FBO assert that they do not have sufficient contact with the City of Mackinac Island to justify the City's authority over them, such argument is rejected by this Court. The City of Mackinac Island is the reason for the existence of the ferry boat service operated by the FBO. Their service is directed to travel to and from the City of Mackinac Island.

The Court also rejects the assertion of insufficient benefits. FBO asserts they do not receive sufficient benefits from the City in exchange for their payment of a franchise fee. As has already been decided, the payment of a ferry franchise fee is payment for a property right. Accordingly, such argument does not persuade this Court that the FBC should be declared invalid because of insufficient benefits (nexus).

The proofs are insufficient to establish denial of due process, whether it be procedural or substantive, in the enactment of the FBC. This Court does not deem that a discussion of due process is required as its principles are well recognized and the facts of this case do not place in issue the violation of any such constitutional rights.

This Court concludes that the adoption of the FBC and its enforcement will not place an undue burden on interstate commerce as respects the FBO.

The evidence does not establish that the FBO are operating in interstate commerce. Their routes take them from one of two points within the State of Michigan, (St. Ignace or Mackinac City), to Mackinac Island. They travel a direct route, never leaving the waters of the State of Michigan. The FBO boats are subject to the laws of no state other than Michigan.

Further, of the three FBO companies party to this lawsuit, only one, Arnold Transit Company files a tariff with the Interstate Commerce Commission.

The fact that a substantial number of passengers come from outside the State of Michigan does not, by itself, place an unreasonable burden upon interstate commerce through the enforcement of the FBC. The ferry boat trip to Mackinac Island is not part of a continuous interstate journey. Rather, it is a separate excursion apart from any possible interstate travel and only within the State of Michigan.

By any reasonable standards, only a minute fraction of the ferry boat passengers could arguably be interstate commerce. These would be passengers who travel on ferry boats as part of a single through ticket purchased out of the state. These passengers constitute an insignificant portion of the passengers carried.

RELIEF GRANTED

The Court denies Plaintiff's motion for rehearing.

The Court concludes that the FBO have failed to establish their respective claims as set forth in their complaint with respect to those issues which have survived the partial summary judgment heretofore granted. The relief requested by Plaintiffs is denied; judgment shall be entered on behalf of Defendant together with costs.

Defendant shall promptly present to the Court a judgment consistent with this decision as required by the Michigan General Court Rules.

(s) MARTIN B. BREIGHNER
Circuit Judge

Dated: 9-26-78

STATE OF MICHIGAN
MACKINAC COUNTY CIRCUIT COURT

PRETRIAL STATEMENT AND ORDER
(Filed: July 11, 1978)

A pretrial conference was held in the City of Petoskey, on the 10th day of July, 1978, with all counsel present as well as parties involved in the controversy. This case was originally set for trial as to unresolved issues on this date.

Because of the posture of the case, the Court agreed to continue the trial date in order to give counsel additional time for trial preparation. The trial will be scheduled to commence at 9:00 a.m., in the City of Petoskey, on August 30, 1978, and the Court will make available two full days for trial. No additional time will be available for trial and counsel agree that the case can be completed within the two day period.

All discovery shall be completed by August 21, 1978. On or before that date, counsel shall file with the Court, in the form of a pleading, the names of all witnesses intended to be called, and a list of all exhibits intended to be used. No exhibit will be admitted and no witness will be allowed to testify unless the disclosure contained in this order is made.

A review with counsel of the outstanding issues in this controversy indicates that the following issues are to be tried on the subject trial date.

1. Nexus.

2. Open Meetings Act.

3. Burden on interstate commerce.

4. Due process.

(a) Procedural due process regarding the passage of the subject ordinance.

(b) Substantive due process concerned with rights acquired by the ferry boat owners prior to the adoption of the ordinance.

The Court will not permit proofs on any issue except those issues which have been set forth above and all parties and counsel have agreed that these are the remaining issues to be resolved by the Court.

The parties are directed to file with the Court on or before August 25, 1978, a stipulation of all facts which are not in dispute, including facts upon which the parties will rely as they appear in depositions heretofore and hereafter to be filed in this cause.

The parties are directed to file with the Court on or before August 30, 1978, proposed findings of fact for the Court to consider.

The Court will not order that Plaintiff answer unanswered interrogatories propounded by the Defendant and dated June 16, 1978.

Plaintiff's motion for re-hearing will be reserved until the proofs are received on the trial date.

There will be no further adjournment of this cause for any reason and all parties agree that the schedule set forth in this pretrial order is reasonable and acceptable to them.

Dated: July 11, 1978

(s) MARTIN B. BREIGHNER
Circuit Judge

Approved:

PLEASE NOTE: THE COURT REQUESTS EACH ATTORNEY TO SIGN AND FILE ONE COPY OF THIS RESUME, SHOWING APPROVAL OF THE WITHIN INFORMATION.

Partial Final Summary Judgment

STATE OF MICHIGAN
MACKINAC COUNTY CIRCUIT COURT

PARTIAL FINAL SUMMARY JUDGMENT
(Filed: June 9, 1978)

At a session of said Court held in the County of Emmet, City of Petoskey, on the 9th day of June, 1978.

PRESENT: The Honorable Martin B. Breighner,
Circuit Judge

This cause having come on to be heard by this Court upon cross-motions for summary judgment by the Plaintiffs pursuant to GCR 117.2(2) and (3) and by the Defendant pursuant to GCR 117.2(1) and (3); this Court having considered said Motions and the briefs of counsel, and oral argument having been waived and the motions submitted to the Court for resolution and decision on the files and records in said cause; and the Court otherwise being fully informed in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, City of Mackinac Island, is granted partial final summary judgment against Plaintiffs, Arnold Transit Company, Straits Transit Company, Shepler's Incorporated and Argosy Boat Line Incorporated, as follows:

(a) The City has authority to require a franchise fee for the operation of ferry boats to or from the City and the City has authority to charge a fee for the franchise, based upon gross receipts of the Ferry Boat Operators.

(b) The fee imposed by the City's Ferry Boat Code is a franchise fee, not a tax.

(c) The fee imposed by the City's Ferry Boat Code is not invalid as an excessive fee for regulation.

(d) The authority of the City to franchise ferryboats has not been preempted by any other level of government.

(e) The City's Ferry Boat Code is not impermissibly vague, and does not vest the City Council with impermissible discretion.

(f) The penalty provisions of the City's Ferry Boat Code are not unconstitutionally vague.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment is denied the City as to the contentions of the Plaintiffs' Complaint regarding whether the Ferry Boat Code was adopted in conformity with the Open Meetings Act, with due process of law, and with the requirements of the City Charter and whether there is a sufficient nexus between the City and the Ferry Boat Operators to permit a franchise requirement and whether the Ferry Boat Code places an undue burden on interstate commerce. As to these issues the Court concludes that it would be inappropriate to grant summary judgment to the City without giving the Plaintiffs opportunity to produce evidence in support of such claims, and, therefore, sets trial with regard to these issues.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this is a final partial judgment against Plaintiffs, Arnold Transit Company, Straits Transit Company, Shepler's Incorporated and Argosy Boat Line Incorporated, it being expressly determined that there is no just reason for delay of entry of this judgment and that it ought to be entered forthwith.

(s) MARTIN B. BREIGHNER
Circuit Judge

STATE OF MICHIGAN
MACKINAC COUNTY CIRCUIT COURT

DECISION OF THE COURT
(Filed: May 12, 1978)

Plaintiffs are operators of ferry boats (hereafter called Ferry Boat Operators or F B O) between points located on the mainland of the State of Michigan and Mackinac Island. They transport, for hire, passengers, freight and United States mail. They bring this action seeking to invalidate an ordinance enacted by the City of Mackinac Island (hereafter called City) on June 29, 1977, and designated as the Ferry Boat Code (hereafter called Code). Both parties move for summary judgment, Plaintiffs pursuant to GCR 117.2(2) and (3) and Defendants pursuant to GCR 117.2(1) and (3).

CLAIMS OF PARTIES

The F B O's attack the Code on six grounds. Their motion for summary judgment is based on three of these. They are as follows:

(a) F B O's contend enactment of the Code is beyond the scope of powers granted the City in its charter.

(b) It is contended the Code is an invalid tax upon the business of the F B O without authorization by statute, charter or constitution and totally out of proportion to any benefits received, and unrelated to costs of regulation.

(c) The Code is unconstitutional and invalid for the reason that it seeks to regulate subjects already regulated by Federal and State statutes and for the reason that it places an undue burden on interstate commerce.

The City contends the Code is valid and enforceable and, as a matter of law, summary judgment should be granted it for the following reasons:

(a) The City has authority to require franchise for the operation of ferry boats and to charge a fee for the franchise, based upon gross receipts of the F B O.

(b) The fee imposed by the Code is a franchise fee, not a tax.

(c) The fee imposed by the Code is not invalid as an excessive fee for regulation.

(d) The authority of the City to franchise ferry boats has not been preempted.

(e) The Code is not impermissibly vague, and does not vest the city council with impermissible discretion.

(f) The penalty provisions of the Code are not unconstitutionally vague.

(g) The Code was enacted in compliance with the open meetings act, due process of law and the city charter; a sufficient nexus exists between the City and the F B O, and the Code does not unreasonably burden interstate commerce.

POSTURE OF CASE

As already noted, the case is before the Court for disposition of motions for summary judgment. Extensive affidavits have been filed to support the pending motions and comprehensive briefs have been submitted. Oral argument has been waived and the motions have been submitted to the Court for resolution and decision on the files and records in said cause.

I.
IS THE CITY AUTHORIZED BY ITS CHARTER TO ENACT THE FERRY BOAT CODE?

The City contends it has the power to franchise ferries. The F B O's contend no such power has been granted the City in its charter.

Chapter IX, Section 1, states:

"Said City of Mackinac Island shall, in addition to such other powers as are herein conferred, have the general powers and authority in this Chapter mentioned; and the council may pass ordinances in relation thereto and for the exercise of the same, as they may deem proper, namely:

". . . Thirteenth. To establish or authorize, license and regulate ferries to and from the city, or any place therein, or from one part of the city to another, and to regulate and prescribe from time to time the charges and prices for the transportation of persons and property thereon."

It is universally accepted principle of law that there is no right to operate a public ferry without a franchise.

"In other words, the right to establish and operate a public ferry, which was under the English common law a franchise of the crown, is in this country a right of the state, . . . The right is a franchise which cannot be exercised without the consent of the state, and no person, although he may own the land on both sides of the stream, may establish such a ferry unless authorized to do so by the proper authority . . ." CJS Ferries, §3, pp 310-311.

Inhabitants of Town of Beals v *Beal*, 98 A2d 552 (Maine, 1953), is a recent case reflecting this authority.

"A ferry is a liberty, or a right, to have a boat for passage across a body of water in order to carry passengers or freight for a reasonable toll. It is a continuation of a highway . . .there is no proprietorship in a ferry in this state except by franchise conferred by a statute . . . The power to establish ferries is not exercised

by the federal government but lies within the scope of those undelegated powers reserved to the state." (p 554).

The franchising power that originates in the states can be delegated to municipalities or other units of local government.

"Inferior bodies, such as counties, municipalities or other state agencies or political subdivisions, may establish ferries and grant ferry franchises under power delegated to them by the state, but in the absence of such a delegation of power they ordinarily lack authority to do so." CJS Ferries, §8 p 314.

The issue before the Court is whether the State did delegate to the City the power to franchise. This Court concludes that the City does have power to franchise ferries as operated by the F B O.

The language used by the legislature in the charter, granted the City by Special Act, specifically conferred upon the City the power to "authorize" ferries to and from the City. Authorize means: "to empower; to give a right or authority to act." Black's Law Dictionary, 169 (Revised, 4th Ed. 1968). "Authorize" is synonomous with "franchise".

Courts have recognized the interchangeability of "franchise" and "authorize".

In *Guinn* v *Eaves*, 101 SW 1154 (TN, 1906), the Court recognized that ferry franchising power was granted by a statute which used the word "authorize".

"Substantially two questions are presented, or, rather, the various controversies may be arranged under two inquiries; that is, whether Eaves was entitled to the preference in the matter of the *ferry franchise*, and if he

was not, did the county court of Meigs County act improvidently in granting the franchise to Guinn?

"The sections of Shannon's Code bearing upon the subject are the following:

" '1696. The County court shall *authorize* the owner of any ferry landing, or the owner of land on each side of the river where a ferry has been or shall be established, to erect a ferry or ferries at said landings.

" '1697. When the banks are owned by different persons, each owner shall be authorized to keep a ferry . . . .' " (p1155, emphasis added).

In *Hanson* v *Hunter Electric Light Co*, 48 NW 1005 (Iowa, 1891), affirmed on rehearing 53 NW 84 (1892), the court analyzed a portion of the Iowa Code dealing with municipal authority to franchise.

"Section 471, as amended, is as follows: 'They shall have power to erect waterworks, or to establish and maintain gas works, . . . or to authorize the erection of the same . . .' " (p 1006, emphasis added).

The Iowa court found that the statute giving the municipality the power to "authorize" granted the power to franchise. ". . . (T)he ordinance clearly authorizes the erection of an electric light plant and therefore comes under §471. *It grants a franchise* to occupy the streets and alleys . . .". (pp 1006-1007, emphasis added).

California v *Central Pacific Railroad*, 127 US 1; 8 S Ct 1073; 32 L Ed 150 (1887), stated: "No private person can establish a public highway, or a *public ferry*, or railroad, or charge tolls for the use of the same, without *authority* from the legislature, direct or derived. *These are franchises*. No private person can take another's property, even for a public use, without such *authority*." (p 40, emphasis added).

Consolidated Gas Co v *Mayor, Etc.* of Baltimore, 61 A 532 Maryland, (1905), declared: "And so in *Tuckahoe Canal Co* v *Tuckahoe, Etc., R. Co.* . . . it was said: 'Now, I take a franchise to be (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons by grant of this sovreign (with us, by special statute) to exercise powers or to do and perform acts which, without such grant, they could not do or perform . . . *So it is a franchise* to be empowered to build a bridge or keep a ferry over a public street . . .' " (p 534, emphasis added, parenthetical phrase in original).

That language from *Consolidated Gas* was quoted approvingly in *State* v *Portland General Electric Co*, 95 P 722 (Or, 1908). "A *franchise* is (1) an incorporeal hereditament; and (2) a privilege or *authority* vested in certain powers by grant of the state to exercise powers or to do and perform acts which, without such grant, they could not do or perform." (p 731, emphasis added).

If the Michigan Legislature did not mean by the language used in the City's charter to grant the power to franchise ferries, what did it mean? Through the use of this language the legislature must have intended to confer some power. If the power to "authorize" does not describe and confer franchising power to the City, then what power does it confer?

This Court concludes the City has been delegated the power to franchise ferry boats and the Code is the exercise of that power.

This issue is one of law for determination by the Court. No factual development is necessary for its resolution. Accordingly, summary judgment as to this issue is granted the City pursuant to GCR 117.2(1).

II.
DOES THE ORDINANCE LEVY AN INVALID AND UNCONSTITUTIONAL TAX OR CHARGE UPON FERRY BOAT OPERATOR'S BUSINESS?

Having established that the City has the power to franchise, it must now be decided as to whether the franchise fee required in the ordinance is invalid and unconstitutional.

A franchise fee is not a tax. It is a price paid for a franchise or public right vested in an individual. *Chilvers* v *The People*, 11 Mich 43, 50 (1862); *Billings* v *Breining*, 45 Mich 65 (1881); *Kitson* v *Ann Arbor*, 26 Mich 331 (1873); OAG 1957, No. 2739, p 110.

When a city grants a franchise it is conferring upon the franchisee a valuable property right for which payment is appropriate. The amount required to be paid pursuant to the granting of a franchise is consideration for the transfer of a property right.

This Court concludes that the determination of the amount of the franchise fee based upon gross receipts under the Code is proper.

In discussing franchise fees in general, McQuillan, Municipal Corporations (3rd Ed), §34.37, p 102 states:

> "A municipal corporation, having entire control of its streets and the power to impose conditions on granting a franchise to use the streets may require compensation for their use by public servant companies, as a condition of the grant of the right to use them, unless forbidden by statute or contrary to public policy. The grantee may be required to pay a certain portion of its receipts as compensation for the use of streets, or a certain percentage of his net earnings . . .". (p 102).

A franchise fee is not a tax even though the result of charging such a fee may be to raise money for the city. Further, the charge for the franchise is not a fee imposed under the police power for purposes of regulation. It is not necessary for the city to demonstrate that the charge is related to the cost of regulation.

Since the Court concludes that the franchise fee charged by the city is a quid pro quo for the property right of operating a ferry, no issue of fact can be involved with respect to the validity of such charge as a tax or an unjustified license fee. Accordingly, summary judgment with respect to claims of the F B O directed toward the franchise fee is granted Defendant pursuant to MGCR 117.2(1).

III.
DOES THE CODE FAIL BECAUSE OF PREEMPTION?

It is clear from the files and records in this cause that no other governmental authority has sought to franchise the F B O. The right to franchise belongs to the State. The State has made no attempt to exercise this right. Instead, it has delegated the right to franchise to the City.

In addition to exercising power to franchise, the Code does provide for some regulation. This regulation is not extensive. Rate schedules are subject to the prior approval of the city council. Rates are regulated to the extent that discriminatory rates are prohibited. The F B O are also required to notify the City of events and occurrences occasioned by requirements and actions of other governmental bodies.

The Michigan Public Service Commission has regulatory authority over ferries, arising out of MCLA 460.201. This statute generally provides for regulation of schedules and

rates of carriers by water. The statute does not require a certificate of public convenience or necessity.

The regulatory provisions of the Code do not conflict with State regulation. This Court concludes that regulation of the Michigan Public Service Commission pursuant to appropriate statute does not preempt the City's right to regulate as set forth in the Code.

The Interstate Commerce Commission exercises some jurisdiction by statute over ferry boats. See *40 USCA §902(i)*. However, there is reserved to the State the right to regulate ferry boats. *49 USCA § 903(j)*.

It should also be recognized that the Interstate Commerce Commission is only involved in regulation of one of the plaintiffs, to-wit: Arnold Transit Company.

Furthermore, the jurisdiction of the Coast Guard does not conflict with regulatory provisions in the Code.

The Coast Guard inspects vessels annually for safety and must certify them before they can be allowed to sail. In addition, the personnel operating the vessels must be approved. With respect to safety, the Code requires that "the ferry boat operated in connection with a ferry boat service shall meet all of the safety regulations of the United States Coast Guard." §11(a).

Under the Code, F B O must prove their Coast Guard certification and report to the City any Coast Guard imposed violations.

Coast Guard involvement is limited to safety measures. The Coast Guard in no way franchises ferry boats. Compliance with Coast Guard safety requirements does not eliminate the need to comply with requirements of other governmental units. There is no conflict or preemption here.

Lastly, there is no preemption by involvement on behalf of the F B O with the United States Postal Service. The postal service's relationship with its carriers is contractual. The postal service does not purport to regulate rates or to franchise or authorize the ferry to operate.

This Court concludes that the City's regulation under the ordinance is not preempted by federal law and regulation.

The Federal preemption doctrine does not bar all state regulation and control by the state or its duly delegated political subdivision. A state is only limited in regulating subject matter under Federal jurisdiction to the extent it seeks to impose stricter conditions than those required by Federal regulation unless exclusive regulation of the subject matter has been exercised by the Federal government. *Covert Assessor* v *State Tax Commission*, 77 Mich App 634. In this case, the record does not establish either an express intention by Congress to preempt or an inevitable Federal-State conflict as implying preemption. The Federal government has not sought to exercise exclusive jurisdiction over the F B O.

Since the issue of preemption as discussed herein is an issue of law, the Court concludes that no factual development is necessary for resolution of this issue and accordingly grants the City summary judgment on such issue pursuant to GCR 117.2(1).

IV.
IS THE CODE IMPERMISSIBLY VAGUE AND DOES IT VEST THE CITY COUNCIL WITH IMPERMISSIBLE DISCRETION? ARE THE PENALTY PROVISIONS OF THE CODE UNCONSTITUTIONALLY VAGUE?

Discretion granted the city council by the Code is minimal. Subject only to the Section 6 requirement that

schedules of services be approved, the council has no discretion regarding the granting of a ferry franchise to an applicant who has applied and paid the $25.00 application fee. Section 8(a) of the Code is not vague in stating:

> "Upon the approval of the filed schedule of services or waiver of the same by the council, and receipt of the application fee, the council *shall* issue a franchise as is required by this ordinance." (Emphasis added).

Discretion allowed the council with respect to approval of the schedule of services is reasonable in order to meet the needs of the City and the F B O. The City depends entirely upon ferry boat operations for commerce to and from the island.

The council's discretion is guided by standards set forth in Section 6(a) of the Code requiring the council to "consider the needs, safety and welfare of the public in approving or disapproving any such schedule of services". The Code provides for a complete waiver of the schedule requirements if the proposed ferry service "is not readily adaptable to operation on a scheduled basis". Code, Section 6(a).

Regarding notice, the standard to which the Code must be compared is set forth in the following decision:

> "A penal ordinance must be so clear that any ordinary person can tell what he may or may not do thereunder; that is, the terms of the ordinance cannot be so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Kalita* v *City of Detroit*,—700.

This Court concludes the Code meets the required standard. A person of ordinary intelligence can determine whether or not he has been granted a franchise as required in Section 4. He can know whether he has filed a schedule

of services, as required under Section 5, or whether he has notified the council of a violation of Coast Guard regulations, as required under Section 11(b).

Penalties imposed by the Code are determinable and easily applied. Enforcement is pursuant to the provisions of the Charter, Chapter VII, which extensively sets out the mechanism for the imposition and enforcement of ordinance penalties.

Construction of the ordinance in constitutional terms as to delegation of authority, vagueness and notice are questions of law to be resolved by this Court. No factual development is necessary to assist the Court in making this determination. Accordingly, summary judgment as to these issues is granted the City pursuant to GCR 117.2(1).

V.
OTHER ISSUES TO BE RESOLVED

F B O's contend the Code was enacted in conflict with the open meeting act, due process of law and the City charter. They further contend an insufficient nexus is present between the City and the F B O and that the Code is an unreasonable burden on interstate commerce. While substantial factual information has been developed through the filing of affidavits, this Court concludes that it would be inappropriate to grant a GCR 117.2(3) summary judgment to the City without giving to the F B O opportunity to produce evidence in support of these claims.

Accordingly, summary judgment is denied the City as to the contentions of the F B O regarding the open meetings act, due process of law, whether or not requirements of the City charter were met in the enactment of the ordinance, nexus and burden on interstate commerce.

RELIEF GRANTED

As set forth in this opinion, summary judgment is granted the City with respect to all of the claims of the F B O as set forth in their complaint except for claims described in the paragraph immediately preceeding Trial will be had with regard to these issues.

The City shall present to the Court an Order granting partial summary judgment in accordance with the provisions of this decision. No costs are awarded.

Dated: March 12, 1978

(s) Martin B. Breighner

49 USCA §906

(a) Filing, printing, and maintenance of tariffs

Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggragate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

Statement of charges

All charges of common carriers by water shall be stated in lawful money of the United States. The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published, filed, and posted, and the Commission is authorized to reject any tariff filed with it which is not in accordance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(c) Amount chargeable

No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this chapter or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the

tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: *Provided*, That the provisions of sections 1(7) and 22 of this title (which relate to transportation free and at reduced rates), together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water.

(d) Filing as precondition to transportation

No common carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter. No change shall be made in any rate, fare, charge, classification, regulation, or practice specified in any effective tariff of a common carrier by water except after thirty days' notice of the proposed change filed and posted in accordance with this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow changes upon notice less than that herein specified, or modify the requirements of this section, either in particular instances or by general order applicable to special circumstances or conditions.

(e) Reasonable minimum rates and charges; practices

It shall be the duty of every contract carrier by water to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations, and practices to be applied in connection with said reasonable minimum rates and charges. It shall be the duty

of every contract carrier by water to file with the Commission, post, and keep open for public inspection, in accordance with such rules and regulations as the Commission shall prescribe, schedules of minimum rates or charges actually maintained and charged for interstate and foreign transportation to which it is a party, and any rule, regulation, or practice affecting such charges and the value of the service thereunder. No contract carrier by water, unless otherwise provided by this chapter, shall engage in transportation subject to this chapter unless the minimum rates or charges actually maintained and charged have been published, filed, and posted in accordance with the provisions of this chapter. No new rate or charge shall be established and no reduction shall be made in any rate or charge, either directly or by means of any change in any rule, regulation, or practice affecting such rate or charge, or the value of service thereunder, except after thirty days' notice of the proposed new rate or charge, or of the proposed change, filed in accordance with this section. The Commission may, in its discretion and for good cause shown, allow the establishment of any such new rate or charge, or any such change, upon notice less than herein specified, or modify the requirement of this section with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the new rate or charge, or the change proposed to be made, and the time when it will take effect. It shall be unlawful for any such carrier to transport passengers or property or to furnish facilities or services in connection therewith for a less compensation, either directly or by means of a change in the terms and conditions of any contract, charter, agreement, or undertaking, than the rates or charges so filed with the Commission: *Provided*, That the Commission, in its discretion and for good cause shown, either upon application of any such carrier or carriers, or any class or group thereof, or upon its own initiative may, after hearing, grant relief from the provisions of this subsection to such extent,

and for such time, and in such manner as, in its judgment, is consistent with the public interest and the national transportation policy declared in this Act.

(Feb. 4, 1887, ch. 104, pt. III, §306, as added Sept. 18, 1940, ch. 722, Title II, §201, 54 Stat. 935.)

49 USCA §909

(a) Precondition to transportation; certain operational common carriers by water

Except as otherwise provided in this section and section 911 of this title, no common carrier by water shall engage in transportation subject to this chapter unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That subject to section 910 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c) of this section, and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within

such period, the continuance of such operation shall be lawful pending determination of such application: *Provided, further,* That, subject to the provisions of section 910 of this title, if any person (or his predecessor in interest) was in operation on August 26, 1958, over any inland waterway, other than the high seas, as a common carrier by water, in interstate or foreign commerce, between points in the Territory of Alaska, and has so operated in Alaska since that time (or if engaged in furnishing seasonal service only, was engaged in such operations in the year 1958 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person or his predecessor in interest had no control, a certificate shall be issued authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made as provided herein on or before December 31, 1960. Pending the determination of any such application, the continuance of such operations without a certificate shall be lawful. Applications for certificates under this proviso shall be filed with the Commission in writing, and in such form, contain such information and be accompanied by proof of service upon such interested parties as the Commission shall require.

(b) Applications

Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

(c) Issuance

Subject to section 910 of this title, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the applica-

tion, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Specifications; terms and conditions

Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this chapter or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) Rights conferred

No certificate issued under this chapter shall confer any proprietary or exclusive right or rights in the use of public waterways.

(f) Contract carrier permits

Except as otherwise provided in this section and section 911 of this title, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 910 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (g) of this section, and such permit shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operations shall be lawful pending the determination of such application: *Provided further*, That, subject to the provisions of section 910 of this title, if any person (or his predecessor in interest) was in operation on August 26,

1958, over any inland waterway, other than the high seas, as a contract carrier by water, in interstate or foreign commerce, between points in the Territory of Alaska, and has so operated in Alaska since that time (or if engaged in furnishing seasonal service only, was engaged in such operations in the year 1958 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person or his predecessor in interest had no control, a permit shall be issued authorizing such operations, without further proceedings, if application for such permit is made as provided herein before December 31, 1960. Pending the determination of such application, the continuance of such operations without a permit shall be lawful. Applications for permits under this proviso shall be filed with the Commission in writing, and in such form, contain such information, and be accompanied by proof of service upon such interested parties as the Commission shall require.

(g) Permit applications

Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 910 of this title, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a

contract carrier by water, as are necessary to carry out the requirements of this chapter or those lawfully established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require.

(Feb. 4, 1887, ch. 104, pt. III, §309, as added Sept. 18, 1940, ch. 722, title II, §201, 54 Stat. 941, and amended July 12, 1960, Pub. L. 86-615, §§4, 5, 74 Stat. 384.)

Exhibit A Attached to Petitioners' Complaint

CITY OF MACKINAC ISLAND
FERRY BOAT CODE ORDINANCE

THE CITY OF MACKINAC ISLAND ORDAINS:

Section 1. Short Title. The "City of Mackinac Island Ferry Boat Code" which may be cited as such, and will be referred to herein as the "Ferry Boat Code".

Section 2. Declaration of Purpose. The purpose of the Ferry Boat Code is to provide fair regulation of ferry service to and from the City of Mackinac Island in the interest of the public, to promote and encourage adequate, economical and efficient ferry service to and from the City of Mackinac Island, to promote and to encourage harmony between ferry boat companies and their customers and passengers and to provide for the furnishing of ferry service without unjust discrimination, undue preferences or advantages.

Section 3. Definitions. The following words, when used in this Ferry Boat Code, shall have the following meanings, unless otherwise clearly apparent from the context:

(a) The word "person" means and includes one (1) or more individuals, firms, corporations, associations, partnerships or organizations of any kind, and combination thereof.

(b) The words "ferry boat" shall mean any boat used to transport persons and/or property to and from the City of Mackinac Island.

(c) The words "ferry boat service" shall mean the transporting of persons and/or property for pay to or from the City of Mackinac Island by ferry boat.

(d) The words "ferry boat company" shall mean any person which owns, controls, operates or manages a ferry boat providing a ferry boat service.

(e) The words "to or from the City of Mackinac Island" shall mean to or from the City of Mackinac Island where

the ferry boats depart, or are destined to points and places within the State of Michigan, respectively.

(f) The word "Council" shall mean the City Council of the City of Mackinac Island.

Section 4. Franchise Required.

(a) No person shall operate a ferry boat service nor shall any person provide a ferry boat service or acquire ownership or control of a ferry boat company in the City of Mackinac Island without such person having first obtained a franchise therefor from the City of Mackinac Island.

(b) No person shall use, occupy or traverse any public place or public way in the City of Mackinac Island or any extensions thereof or additions thereto, for the purposes of establishing or maintaining a ferry boat service or any facility used in conjunction therewith including but not limited to any building, pier, piling, bulkhead, reef, breakwater or other structure in, upon or over the waters of the city harbor, without such person having first obtained a franchise therefor from the City of Mackinac Island.

Section 5. Franchise; Application; Contents; Fees.

(a) The application for a franchise to operate a ferry boat service shall be made in writing to the Council and include: (1) the applicant's name, and if other than a single individual, a certified copy of the partnership agreement, articles of association, or articles of incorporation, as the case may be; (2) the applicant's principal place of business; (3) a description of each ferry boat which will be used to provide a ferry boat service; (4) a schedule of ferry boat services proposed to be operated including arrival and departure times to and from the City of Mackinac Island and the passenger capacity for each scheduled trip. The application shall be accompanied by an application fee of $25.00.

(b) If a ferry boat service will be operated in such an irregular fashion so that a time schedule of services is not

feasible, no such schedule of services need be filed with the application.

Section 6. Schedule of Services; Approval; Modification.

(a) The schedule of services of all persons proposing to provide a ferry boat service must be approved by the Council prior to the commencement of any ferry boat services. The Council must consider the needs, safety and welfare of the public in approving or disapproving any such schedule of services. The Council may determine that any proposed ferry boat service is not readily adaptable to operation on a scheduled basis and may approve the operation of such ferry boat service without the filing of a schedule of services. Approval to operate without having filed a schedule of services may be revoked at any time by the Council if the Council determines that the filing of a schedule of services is feasible and in the best of interests of the public.

(b) Any modification to the filed schedule of services must be approved by the Council.

Section 7. Schedules; Duties.

(a) Any ferry boat company must operate in accordance with its schedule of services as is on file with the Council. However, nothing in this ordinance shall be interpreted as limiting any ferry boat company from offering ferry boat services in addition to the services contained in its filed schedule of services.

Section 8. Franchise; Issuance; Display; Transfer.

(a) Upon the approval of the filed schedule of services or waiver of the same by the Council, and receipt of the application fee, the Council shall issue a franchise as is required by this ordinance.

(b) Upon the granting of such franchise, the Clerk of the City of Mackinac Island shall issue a certificate evidenc-

ing the existence of such franchise, which must be publicly displayed on all ferry boats providing a ferry boat service.

(c) No franchise granted hereunder may be sold, transferred or assigned unless such transaction is first approved by the Council after receipt of a written application therefor, containing the same information as to transferee as would be required of an original applicant.

Section 9. Franchise; Nonexclusive; Term; Form.

(a) Any franchise issued pursuant to this Ferry Boat Code shall be a non-exclusive franchise for a term of years, not to exceed ten years, as the Council may approve and shall be issued in the form to be determined by the Council.

Section 10. Franchise; Fees; Reporting; Records.

(a) During the term of any franchise granted pursuant to this Ferry Boat Code, the person granted such franchise shall pay to the City of Mackinac Island in consideration of the granting of such franchise a monthly franchise fee in the amount of 1½% of the gross receipts from all charges for providing a ferry boat service.

(b) The monthly franchise fee shall be due and payable on the last day of each month in which any ferry boat service is performed. Such franchise fee shall be paid monthly during the existence of the franchise on or before the 15th day of the month following the month for which the franchise fee is due and payable. Said franchise fee is to be paid at the Treasurer's Office of the City of Mackinac Island during regular business hours. If the City Treasurer's Office is closed on said 15th day, then payment may be made during regular business hours on the next following day on which the office is open for business.

(c) Each payment of the monthly franchise fee shall be accompanied by a statement setting forth in detail the computation of said franchise fee, including the gross receipts for the period for which the payment is made and certified under oath by the franchisee or an officer thereof.

(d) The City shall have the right to inspect at all reasonable times the customer records of any person granted a franchise hereunder from which its franchise fee payments are computed and shall have the right of audit and recomputation of any and all franchise fees paid. No acceptance of any payment shall be construed as a release or as an accord and satisfaction of any claim the City may have for further or additional sums payable as a franchise fee under this Ferry Boat Code or for the performance of any other obligation hereunder.

Section 11. Safety Regulations; Reporting Requirement.

(a) The ferry boats operated in connection with a ferry boat service shall meet all of the safety regulations of the United States Coast Guard. Any person operating a ferry boat in connection with a ferry boat service must provide written evidence of satisfaction of all of the United States Coast Guard regulations prior to the commencement of any ferry boat service.

(b) Any person operating a ferry boat in connection with a ferry boat service must give notice to the Council, in writing, of any violation of the United States Coast Guard regulations of which such person has been informed by the United States Coast Guard, either in writing or by verbal communication.

Section 12. Rates; Filing Requirements.

(a) No ferry boat company shall make any unjust or unreasonable discrimination in rates, charges, classifications, promotions, practices, regulations, facilities or services for or in connection with ferry boat services, nor subject any person to any prejudice or disadvantage in any respect whatsoever; provided, however, that this shall not be deemed to prohibit the establishment of a graded scale of charges and classification of rates to which any customer or passenger coming within such classification shall be entitled.

Any ferry boat company operating under approval of the Interstate Commerce Commission or the Michigan Public Service Commission, or which have filed tariffs with the Interstate Commerce Commission or Michigan Public Service Commission, shall file a summary of the authorities held from either of these Commissions with the Council. Such ferry boat company shall also file with the Commission a true copy of its tariffs on file with either of these Commissions. The Council shall be given written notice of any proposed modification of the tariffs on file with these Commissions. Such notification shall be given to the Council by any ferry boat company, in writing, as soon as any letter, form, or other document is filed with either of these Commissions seeking a modification of such ferry boat company's tariffs.

Section 13. Rights of City; Public Utility.

Any franchise granted under this Ferry Boat Code is made subject to all applicable provisions of the charter of the City of Mackinac Island and ordinances thereof, and specifically subject to the rights and powers of the City of Mackinac Island and limitations upon the ferry boat company holding such franchise as are set forth in the Charter of the City of Mackinac Island, being Local Acts, 1899, #437, including but not limited to, Section 1, Chapter IX, Paragraph Twelfth, Chapter XV and Chapter XVI thereof which are herein incorporated by reference, and such ferry boat company shall abide by and be bound by said rights, powers and limitations, and any franchise granted under this Ferry Boat Code constitutes and shall be considered as a public utility franchise and a ferry boat company shall be deemed to be a public utility.

Section 14. Miscellaneous Provisions.

(a) Any approval, denial or waiver by the Council pursuant to this Ferry Boat Code shall require the concurrence of a majority of all the elected aldermen.

(b) Any person granted a franchise pursuant to this Ferry Boat Code shall have no recourse whatsoever against the City of Mackinac Island, its officers, boards, commissions, agents or employees for any loss, cost, expense or damage arising out of any provision or requirement of this Ferry Boat Code or the enforcement thereof.

(c) No franchise granted pursuant to this Ferry Boat Code shall be given any value by any court or other authority public or private, in any proceeding of any nature or character whatsoever, wherein or whereby the City of Mackinac Island shall be a party or affected therein or thereby.

(d) Section headings as set forth in this Ferry Boat Code are for convenience only and shall not be a part of this Ferry Boat Code nor be used to construe any provision hereof more broadly or narrowly than its text would indicate.

Section 15. Should any section, clause, or provision of this ordinance be declared to be invalid by a court of record, the same shall not affect the validity of the ordinance as a whole or any part thereof, other than the part so declared invalid.

Section 16. Penalties.

Any person violating any of the provisions of this Ferry Board Code shall, upon conviction thereof, be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment for a period of not more than ninety (90) days, or by both fine and imprisonment. For the purpose of this Ferry Boat Code, each day of violation of Section 4, Section 7 and Section 10 shall constitute a separate offense.

Section 17. Effective Date.

This Ferry Boat Code shall become effective 20 days after its passage by the Council.

PARAGRAPHS FROM APPELLANTS' COMPLAINT FILED WITH STATE OF MICHIGAN, MACKINAC COUNTY CIRCUIT COURT

". . .5. All of the above-named Plaintiffs own and operate businesses which engage in the interstate and intrastate transportation by boat of any or all of the following:

a) Passengers
b) Freight
c) U.S. Mail.

* * *

12. The 'Ferry Boat Code' is void, invalid, and of no effect for the reason that it is a tax, in the nature of an excise tax, designed for the purpose of raising revenue, and the City of Mackinac Island has no power under its charter, the constitution, or the laws of the State of Michigan, to impose a revenue raising tax on ferry boat owners or operators in the form of a gross receipts tax, or in any other form.

13. If Defendant claims that the so-called 'franchise fee' is in substance a charge to defray the cost of regulation, such charge is grossly out of proportion to the cost of regulation, or what is reasonably required for regulatory measures, and therefore unreasonable, confiscatory, an unconstitutional taking, and an abuse of discretion by the City.

14. If Defendant claims that the so-called 'franchise fee' is in substance a charge to defray the cost of police protection or other services rendered by the City to the ferry boat owners, it is grossly out of proportion to the costs of those services and the benefits derived by the ferry boat owners, and therefore unreasonable, confiscatory, and an unconstitutional taking, and in addition, constitutes a denial of equal protection in that it taxes only one class of businesses operating in the City of Mackinac Island for services and protection enjoyed by all businesses.

15. The 'Ferry Boat Code' is unconstitutional, confiscatory, and an unreasonable exercise of the municipality's power.

in that there is not a sufficient nexus between the owners and operators of the ferry boats and the City of Mackinac Island; those businesses being established in places outside the City boundaries of Mackinac Island, all, or most, ticket sales and charges for the transportation of passengers, freight, and other items being generated outside the city boundaries, and there being no rational basis for assessing a fee based upon gross receipts of businesses which generate all or most of their income outside the city boundaries of Mackinac Island.

16. Those portions of the 'Ferry Boat Code' which seek to regulate the schedules, rates, tariffs, or safety standards of ferry boat owners or operators are invalid, void and unconstitutional in that all of the above subjects are incapable of regulation or control by the City of Mackinac Island, having been pre-empted by Federal and State statutes and regulations which vest control of schedules, rates, tariffs and safety standards in the United States Interstate Commerce Commission, the Michigan Public Service Commission, and the United States Coast Guard, and United States Postal Service.

* * *

18. Those portions of the 'Ferry Boat Code' which seek to regulate the schedules, rates, tariffs, or safety standards of ferry boat owners and operators or which seek to impose a 'franchise fee' on said owners or operators are invalid, void, and unconstitutional for the reason that such regulations and fees place an undue burden upon interstate commerce.

* * *

25. Plaintiffs further state that the ordinance, being a fee on gross receipts is, on its face, a revenue raising ordinance and has been recognized as such by the Defendant's City Council, the City Council specifically acknowledged that they wished to raise revenue for the City and did not wish to do it by raising the taxes of the residents but wished to raise it directly from the tourists and the best way to assure that was by a tax on ferry boats."

SUMMARY STATEMENTS QUOTED FROM APPELLANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED WITH THE TRIAL COURT ON AUGUST 30, 1978

'[T]he Code was invalid for the reason that it is in substance, if not form, a tax which is designed solely for the purpose of raising revenue, and that the City has no power to tax the ferry boat operators in this manner.

* * *

[T]he Code was invalid in respect to its requirement of a franchise fee based upon 1½% of gross receipts of the ferry boat operators.

* * *

[T]he Code was invalid to the extent that it sought to impose a fee which far exceeded the costs of any regulation, licensure, police protection or other services provided to the ferry boat operators.

* * *

[T]he Code was unconstitutional and confiscatory in that there was an insufficient nexus between the City and the ferry boat operators to justify a 1½% fee based upon gross receipts.

* * *

The Defendant, City of Mackinac Island, cannot deny that its ordinance is intended to exact a fee from the tourists, sometimes derogatorily referred to as 'fudgies,' for the privilege of coming to the Island. . . .

A fee or tax based upon the number of passengers arriving on the Island via ferry boats, whether done directly or indirectly, contravenes other provisions of the U.S. Constitution . . .

* * *

Absent any showing by Defendant that it has any property or services to grant to Plaintiffs in exchange for the required 'franchise,' this Court must conclude that the franchise fee imposed by Defendant is unconstitutional and confiscatory.

This Court must conclude that the imposition of a gross receipts tax without specific statutory authorization constitutes an unconstitutional taking of Plaintiffs' property."

EXCERPTS FROM APPELLANTS' BRIEF ON APPEAL TO MICHIGAN COURT OF APPEALS

(51)

* * * that in light of the already extensive regulation by the State of Michigan through the Public Utilities Commission, and the evident lack of need for supervision or regulation, the $15 license fee was excessive. The Court stated that:

> ". . . (I)f there is little or no need for supervision or regulation in addition to that effected by the State, and if the city streets are not subjected to an additional burden by interurban bus traffic, the justification for requiring a license at all is meager, to say the least." 259 Mich at 655.

The *North Star* Court also said:

> "As has often been held, the amount of such fee must be gauged by the expense incurred by the municipality incident to issuing the license and supervising the business the licensee carries on thereunder, if supervision is required. A license fee may not be imposed as a tax measure in disguise." 259 Mich at 663.

The Court held that in light of the already extensive State regulation, any license fee imposed by the city must be practically nominal in amount.

The *Checker Cab* and the *North Star* cases are applicable to the instant action. Appellants are already subjected to the regulation and control of the Michigan Public Service Commission, the Interstate Commerce Commission, and the United States Coast Guard. Every regulatory function which the City of Mackinac Island proposes to perform in connection with its Ferry Boat Code is already being performed by another State or Federal agency.

Excerpts from Appellants' Brief on Appeal
To Michigan Court of Appeals

Thus, following the lead of *North Star, supra*, and *Checker Cab, supra*, Appellee can only exact a fee reasonable to the cost of regulating Appellants' businesses and, since Appellants are already subject to extensive regulation, such a fee should be nominal.

Furthermore, ferry boats are the only business which the Appellee requires a substantial sum of money from for a license. Within the boundaries of the City of Mackinac Island, there exists numerous businesses which cater to the tourists (52) who visit the Island each year. Although the Charter of the City of Mackinac Island permits the licensure of these businesses and the collection of a license fee in precisely the same language as the section governing ferries (Chapter XVI), the actual fees charged are nominal. Ordinance No. 143, licensing horse drawn vehicles carrying passengers for hire, imposes a fee ranging from $10 per vehicle to $100 per vehicle. Ordinance No. 166, licensing seasonal businesses, imposes a yearly fee of $200. An ordinance licensing rental horses imposes a yearly fee of $10 per horse. An ordinance licensing rental bicycles imposes a yearly fee of $10 per bicycle.

By contrast, the fees to be paid by Appellants as calculated by Appellee's, total $20,315 for 1977, $36,434 for 1978, and $38,193 for 1979. This is further proof that the proposed 1½% of gross receipts fee is unreasonable.

The $10 per year license fee for rental horses does not even cover the Appellee's costs pertaining to horses. The continuous travel of the rental horses and horse-drawn vehicles greatly increases the cost of street maintenance. This maintenance is necessary not just because of the wear and tear on the streets, but also because of the great expense of cleaning up horse droppings.

Ultimately, it must be concluded that the license fee is unreasonable because the proceeds it would collect exceed

by far the amount necessary to license and regulate Appellants. Even Island businesses which require special expenditures by the city are licensed at considerably lesser rates. A license fee is only reasonable up to the amount needed to regulate. Appellees by their own admition will collect far in excess of the amount needed to regulate from the fee imposed through the Ferry Boat Code.

E. The Excess Funds Collected Over and Above the Amount Necessary to Regulate Appellants Is An Unauthorized Tax.

To the extent that the fee imposed upon Appellants' gross receipts exceeds the costs licensing and regulation, it is * * * (57) because it would collect much more money then would be necessary to regulate Appellants. The excess funds collected are an unauthorized tax. In addition, this tax is unduly burdensome because it singles out ferry boat operators, as opposed to all other Island businesses, for the imposition of this tax. It is decidely unfair and unreasonable to burden Appellants' businesses with such an onerous license fee while the other busuinesses on the Island are not so burdened.

In the case of *City of Lexington* v *Motel Developers*, 465 SW2d 253 (1971), an action was brought challenging the constitutionality of an ordinance imposing upon hotel and motel owners a tax fixed at 5% of rental charged for occupancy of rooms. The Court of Appeals of Kentucky held that the tax was arbitrary and violated constitutional provisions requiring uniformity, where the city had an ordinance imposing upon businesses generally an annual license tax in the amount of 1½% of net profits of businesses. The Court held that this was an invalid singling out of a particular business to carry a proportionately heavier tax load than all other businesses, and that there was no reasonable basis for imposing this additional tax upon this particular business.

Excerpts from Appellants' Brief on Appeal
To Michigan Court of Appeals

All other businesses within the City of Mackinac Island are licensed at nominal rates, while the Appellants fee is excessive. The Appellees singled Ferry Boat Operators out to carry a heavier tax load than all other Island businesses.

CONCLUSION

Appellee is seeking to license Appellants' businesses rather than to franchise them. To franchise is to grant the franchisee a property right. Appellee gives no such right to Appellants.

The authority of the Appellees to license Appellants is in question. However, even if that authority is assumed, the

* * *

(63)

Q (by Mr. Turner) I believe the question was that any moneys that are used from the general revenue fund that will benefit the tourists will benefit the people on the Island as well.

A. That is correct." (Trial transcript pp 18-20)

In the final analysis, the attempt to require a franchise was in reality, an effort to raise revenue. Such an attempt was directed at Appellants since it was felt that they could most easily pass on the cost to their customers—the tourists.

[Mr. Turner]

"Q. What were their [City Council] comments concerning how they were going to raise revenues, from what source?

[Mr. James Brown]

A. Well, Mayor Doud, as the rest of the Council, were concerned about the high taxes and so forth that ad valorem property taxes cause, and they said that

they did not wish to tax the general owners on Mackinac Island any further. They raised eleven mills, and that came out in the discussion, but they wanted to make the tourists pay because they felt that they were using the facilities of Mackinac Island, and that they were being brought there. And there was a lot of discussion, and the Council members differed on this. The natural question was 'Well, don't you want tourists on Mackinac Island', and some said yes and some said no to that. Billy Smith wasn't interested in any more tourists, but Mayor Doud and some of the rest were.

So the general idea was that it would be assessed against the tourists.

Q. Okay, Thank you.

A. And my recollection of the way that it was put is that Mayor Doud said *'We will clip the tourists for the additional money, and you can increase your fares and then it won't cost you anything.'*

Q. Was that at one of these meetings?

A. That was at one of these meetings." (Emphasis added) (Trial Transcript, pp 51-52.

* * *

(65)

As indicated above, in granting a franchise, the municipality gives a property right to the grantee. In the instant case, Appellants would receive no property right. Moreover, Appellants would not occupy any public space to the exclusion of other members of the public. Thus, no property right is received in exchange for the one and one-half percent franchise fee imposed upon Appellants' gross revenues.

Case law also reflects that the grant of a franchise is made only in connection with the grant of a property right to provide services which would very clearly involve the occupation of public space, i.e. streets, railways, water mains or electrical poles.

Excerpts from Appellants' Brief on Appeal To Michigan Court of Appeals

In the case of *Oklahoma Gas & Electric Co* v *Total Energy, Inc.* 499 P2d 917 (1972), the Court considered the issue of whether a company which provides electric power to portions of a municipality must first obtain a franchise if public streets or other public ways of the municipality are not used for its operation. The Plaintiff in *Oklahoma, supra,* possessed a franchise and was seeking to enjoin the defendant from providing power to customers within the municipality absent a franchise. The plaintiff contended that its franchise was a "property right" and thus a similar franchise was required for any use of public space. The Court held that if streets or other public ways are not used in maintaining and operating such business, a franchise is not required to generate, distribute and sell electricity within a municipality. In reaching this conclusion, the Court referred to the State Constitution which provided that a public service corporation was deemed to be "all persons, firms, corporations, receivers or trustees authorized to exercise the right of eminent domain or having a franchise to use or occupy any right of way, street, alley or public highway . . . in a manner not permitted to the general public." This provision is comparable * * * (67) City boundaries. Thus, the statement of the Wyoming Public Service Commission has definite applicability to the instant case.

Ultimately it must be concluded that:

1) Appellee has no exclusive use of public space to grant to Appellants;

2) Appellee has no property right to offer Appellants in exchange for payment of a franchise fee;

3) Appellants have no need of any property right to continue their ferry operations; and

4) The applicable law indicates that a franchise fee cannot be required without the municipality providing some property right to the "franchisee" in return.

Excerpts from Appellants' Brief on Appeal
To Michigan Court of Appeals

Appellee claims that it intends to franchise Appellants, and charge a fee therefor, through the Ferry Boat Code. The applicable law provides that to assess a franchise fee, the Appellee must grant the Appellants the use of a public space. The Appellants travel on navigable waters of the Great Lakes, dock at wharves which they own, and pay for all the services they receive from the Appellee through general property taxes. The Appellee will not grant any property right to Appellants through the Ferry Boat Code. As a result, Appellee's attempt to require a franchise fee must fail.

* * *

(92)

local activities *and the state has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return.*" Ibid at 108. (emphasis supplied)

The City of Mackinac Island provides no benefits or protections to Appellants for which Appellee is justified in taxing 1½% of Appellants gross receipts. The fee imposed upon the Appellants is an undue burden on interstate commerce and thereby violates Article I, Section 8, clause 3 of the Constitution of the United States.

C. Freedom of Travel, Free Passage and Head Taxes.

The fee imposed by the Ferry Boat Code is a fee upon the privilege of passengers to have access to the City of Mackinac Island. The Appellee cannot deny that its ordinance is intended to exact a fee from the tourists, sometimes referred to as "fudgies," for the privilege of coming to the Island.

A tax imposed upon the number of passengers arriving on the Island via ferry boats, whether done directly or indirectly, contravenes many sections of the US Constitution and the Appellee's Charter. As set forth above, this tax violates the Commerce Clause, to wit: Article I, Section 8, clause 3 of the Constitution of the United States. The

freedom to travel is constitutionally protected and has been held to be contained within the Fourteenth Amendment. Furthermore, the Appellee's own City Charter, Section 1, Chapter 15, preserves to all persons the right to free passage, together with their baggage, over any and all wharves and docks owned by the City. Although the City no longer owns the docks and wharves used by any of the Plaintiffs, the provision in the City Charter insuring the right of free passage certainly cannot be avoided by the fact that the docks are privately owned.

In the case of *Evansville* v *Delta Airlines*, 405 US 707, 31 L Ed 2d 620, 92 S Ct 1349 (1972), a municipal airport authority charge of $1.00 for each emplaning passenger was held not to violate the Federal Constitution, but the rationale was * * *

Excerpts from Appellants' Brief on Appeal To Michigan Supreme Court (p. 22)

7. Section 22 specifically states that ". . . each such city and village shall have power to adopt resolutions and ordinances . . . subject to the constitution and law." The law is undeniable. Appellee has no power other than that delegated to it by the Michigan Legislature and, as outlined at length in this Argument, the Legislature did not confer any franchising power on Appellee.

The authority to franchise cable television companies which is based on the Constitutional power to prohibit public utilities from using public highways and on the Constitutional power to control public streets is of no assistance to Appellee. Appellants do not use Appellee's public highways or public streets, and the Ferry Boat Code does not offer Appellants any such use.

C) Conclusion

Ultimately it must be determined that if the Michigan Legislature had wanted to invest Appellee with the power to grant ferry franchises it would have so stated. The Legislature was familiar with the word "franchise," used it elsewhere in the Mackinac Island City Charter, and therefore must have intentionally used different language which was designed to not give ferry franchising power to Appellee.

ARGUMENT II

THE FRANCHISE THAT APPELLEE SEEKS TO IMPOSE ON APPELLANTS DOES NOT POSSESS THE CHARACTERISTICS NECESSARY TO PERMIT APPELLEE TO RAISE REVENUE BY ITS IMPOSITION.

A) Introduction

Even if Appellee is found to possess the necessary power to enable it to impose a franchise requirement on Appellants, Appellee lacks any justification for the exorbit-

ant franchise fee it seeks for said franchise. In order for Appellee to extract a revenue producing fee it must provide Appellants a right to use public property in a fashion not enjoyed by the public at large, i.e. a use of public rights of way to the exclusion of the public. This is demonstrated by a trolley or utility being permitted to lay its tracks, lines or pipes in the public right of way and paying a fee for said privilege. Appellee argued and the Court of Appeals held that a ferry is by definition a franchise [Appellants' Appendix, pp 233a-234a; 99 Mich App 266, 270; 297 NW2d 904 (1980)]:

> " 'A ferry is a right or franchise.' 3 McQuillin, Municipal Corporations (3rd ed) §11.15, p 27.
>
> 'Ferry. * * * In law it is treated as a franchise.' Black's Law Dictionary (4th ed), p 747.
>
> 'Now what is a Ferry? It is a species of franchise.' *Chilvers* v *The People*, 11 Mich 42, 53 (1862)."
>
> Moreover, 'establish' and 'authorize' have been used interchangeably with franchise.
>
> '[T]he privilege of establishing a ferry and taking tolls for the use of the same is a franchise.' *Louisville & Jeffersonville Ferry Co., supra*, 394.
>
> 'The right or privilege to establish and operate a public ferry is a franchise.' 35 Am Jur 2d, Ferries, § 6, p 449.
>
> 'No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature * * * These are franchises.' *California* v *Central Pacific R Co*, 127 US 1, 40; 8 S Ct 1073; 32 L Ed 150 (1887)."

Appellants are not operating ferries as that term has been historically used at common law. It is necessary to review the common law that gave rise to the above quotes and definitions used by the Court of Appeals. In addition to what a "ferry" has been defined to be historically, it is

franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for the disturbance, and in modern practice he usually resorts to chancery, to stay the injurious interference by injunction." (Footnotes omitted) (Emphasis added) James Kent, Commentaries on American Law, Vol III (1884), pp 653-654 wherein pp 458-459 of an earlier edition is set forth.

Thus, Kent's complete definition of ferry franchise is consistent with the definition of ferry franchise gleaned from the common law. A ferry franchise offers exclusivity, a continuation of a highway, a connection with a public right of way in exchange for public obligations regarding facilities, non-discrimination, availability, and perpetuity. Kent says that the consideration for these public obligations is the allowance of charging an exclusive toll. There is not any discussion in the above-quoted definition from Kent that monetary consideration can be exacted from a ferry franchise grantee in addition to the public service obligations imposed.

The Court of Appeals erroneously inferred from the word "consideration" used in the *Louisville* case that it meant only monetary consideration. The Court of Appeals overlooked the fact that service obligations to the public can also be adequate consideration. The Court of Appeals also overlooked the exclusivity requirement.

C) **Three Types of Franchise**

Not only do Appellants not operate ferryboats that are within the requirement of the franchise to continue to operate that Appellee seeks to impose on them, but it is important to remember that there is more than one kind of franchise. If franchises are required for Appellants to continue to operate, then each Appellant already possesses the type of franchise offered by Appellee.

"Corporate franchises are of three classes: (1) the right to organize and exist as a corporation; (2) the right to

Excerpts from Appellants' Brief on Appeal To Michigan Supreme Court (p. 45)

In conclusion, the Court said:

> " '[T]his court does hold, as a matter of fact, that the defendant Cascade Cable Television Company is not * * * installing nor operating a community antenna television system in the City of Jackson. Its operations are confined without the City of Jackson, and its transmissions are being made by the Michigan Bell Telephone Company, which holds a State franchise which the plaintiff City of Jackson cannot usurp.' " Quoted in *Comtel, supra*, 293 NYS 2d, 619-620.

The above-cited cable television cases show that a franchise is indeed a proprietary interest in public land. In the case at bar, the City of Mackinac Island provides no such interest to Appellants. Therefore, Appellants are not granted a franchise by the Ferry Boat Code.

The basic concept recognized by all of the above cases is that in exchange for the franchise fee that Appellee seeks to impose on Appellants, Appellee must give a valuable property right in a public right of way. Appellee has asserted that it agrees with Appellants' position that the giving of the franchise by Appellee and the paying of a franchise fee must be a value-for-value transaction, and Appellee has argued that the franchise itself is a valuable intangible property right. In addition to the problems with Appellee's interpretation of a ferry franchise as above pointed out, such an assertion is at odds with Section 14(c) of the Ferry Boat Code which states:

> "No franchise granted pursuant to this Ferry Boat Code shall be given any value by any court or other authority public or private, in any proceeding of any nature or character whatsoever, wherein or whereby the City of Mackinac Island shall be a party or affected therein or thereby." (Exhibit A, p 26a).

The Court of Appeals incorrectly determined the requirement on the giving of a right to occupy public land in

Excerpts from Appellants' Brief on Appeal
To Michigan Supreme Court (p. 51)

In fact, the City Clerk for the Appellee admitted that licensing was the purpose of the Ferry Boat Code in a letter it directed to the Appellants. The Stipulated Statement of Facts states:

> "Each of the Plaintiffs received a letter from the City Clerk dated March 30, 1977, advising them that the City had retained Fraser, Trebilcock, Davis and Foster, to review the feasibility of imposing a "franchise license fee" upon vessels, and invited the ferry boat owners and their attorneys to discuss same." SSF, p 122a.

In summary, a franchise gives a property right in a public right of way in a fashion not enjoyed by the public at large. No such right was intended to be granted in this case. A license is a non-assignable, non-exclusive, revocable permit. Therefore, Appellants assert that the Ferry Boat Code attempts to license them since it offers the general attributes of a license and does not offer those inherent with a ferry franchise.

Furthermore, since a license fee can only be that amount which is necessary to cover the costs of regulation, any excess revenue obtained under the Ferry Boat Code must be construed as a tax. This is expecially so when it is noted that the definition of a tax is that it is an exaction imposed for public benefit.

> "Exactions which are imposed primarily for public rather than private purposes are taxes. See *People ex rel the Detroit & H R Co* v *Salem Twp Board*, 20 Mich 452, 474; 4 Am Rep 400 (1870). Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed. *Knott* v *Flint*, 363 Mich 483, 499; 109 NW2d 908 (1961); *Fluckey* v *Plymouth*, 358 Mich 447, 451; 100 NW2d 486 (1960)." *Dukesherer Farms, Inc.* v *Director of the Department of Agriculture*, 405 Mich 1, 15-16; 273 NW2d 877 (1979).

Excerpts from Appellants' Brief on Appeal To Michigan Supreme Court (p. 52)

As the trial testimony of Margaret Doud, Mayor of Appellee, shows, the revenue gained from imposition of this fee would be used entirely for public purposes (TT of Margaret Doud, pp 292a-293a). That revenue beyond any needed for regulation purposes is a tax. As Appellee concedes, it has no authority to so tax.

F) Conclusion

A ferry franchise is not as easily defined as Appellee and the Court of Appeals have suggested. There are many characteristics that have historically been considered to be integral to ferry franchises. Among those characteristics are exclusivity, perpetuity, continuation of a public highway, use of a public right of way and the presumption of a grant in the case of a ferry by prescription. The franchises offered by the Ferry Boat Code contain none of these characteristics. Appellee's franchises would merely continue the existing public service obligations, and exact a substantial fee for doing so. Appellee claims that by allowing Appellants the right to continue to operate a ferry, Appellee is granting an intangible property right. Appellee is not granting an intangible property right because it is not providing the necessary ingredients that make a ferry an intangible property right. Even if Appellee was providing all the attributes of a ferry franchise, Appellee could not exact a fee for same because it would only be providing a right for which the only consideration that can be exacted is the non-monetary obligations required of Appellants, i.e., obligations to the public to provide proper service, competent boatmen, proper boats, nondiscrimination, reasonable availability. The only way that Appellee can exact a revenue producing fee from Appellants is if Appellee provides a property right to Appellants in Appellee's public rights of way, *i.e., the right* to use public property in a fashion not enjoyed by the public in general.

Modern case law has recognized that there are three classes of franchises. Appellants already possess the first two classes since each Appellant has been incorporated

on all steam boats which should moor or land in any part of the port violated the tonnage tax restriction. The New Orleans ordinance was broad enough to impose the charge for any landing anywhere within the City limits, not just at wharves constructed and maintained by the City.

If a municipality does not offer wharfage, it might still be able to exact a fee of vessels entering its harbor if the municipality provides services unique to those vessels. Without rendering such services, and without offering wharfage, a municipality cannot exact any fees for entering its harbor.

> "The United States Constitution prescribes that 'No state shall, without the consent of Congress, lay any duty of tonnage . . .' *This clause prevents states and their political subdivisions from charging duties upon vessels coming in from other ports, where the local government has not rendered services to the vessels.* Illustratively, the United States Supreme Court has set aside a New Orleans charge of ten cents per ton on boats entering the port. Whatever, announced the Court, 'which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.' Again, the Court voided a fee for entering the port of New York, the Court noting that *'the charge is not exacted for any services rendered or offered to be rendered.'* And, if the fee charged is solely for entrance into the port, the exaction is invalid even though not measured by tonnage." (Emphasis added) C. Antieau, Commentaries on the Constitution, pp 66-67, citing *Cannon* v *New Orleans, supra*, and *Inman Steamship Co* v *Tinker*, 94 US 238; 24 L Ed 118 (1877).

In the instant case, the only services provided by Appellee to Appellants are the water and sewage, fire and police protection and these are paid for through general ad valorem taxes and through usage charges (SSF, pp

109a-110a). Appellee does not provide street lights for the docks used by the ferryboats nor does Appellee provide street sweeping or snow removal for those docks (SSF, pp 109a-110a). Appellee does not dredge the harbor and while the City Charter designates Appellee's Chief of Police as harbor master, he does not actively function as such (SSF, p 111a). In short, Appellee provides no services or benefits to Appellants unique to their operation of ferryboats. Appellee does nothing for Appellants that it does not already do for any other property owner on Mackinac Island (TT of Margaret Doud, p 291a).

Nevertheless, Appellee seeks to require franchises and franchise fees of Appellants. Section 4 of the Ferry Boat Code states that:

> "(a) No person shall operate a ferry boat service nor shall any person provide a ferry boat service or acquire ownership or control of a ferry boat company in the City of Mackinac Island without such person having first obtained a franchise therefor from the City of Mackinac Island.
>
> (b) No person shall use, occupy or traverse any public place or public way in the City of Mackinac Island or any extensions thereof or additional thereto, for the purpose of establishing or maintaining a ferry boat service or any facility used in conjunction therewith including but not limited to any building, pier, piling, bulkhead, reef, breakwater or other structure in, upon or over the waters of the city harbor, without such person having first obtained a franchise therefor from the City of Mackinac Island." Exhibit A, p 21a.

The above-quoted language does not suggest by any interpretation of it that Appellee is offering any services or wharfage in exchange for the franchises. Nevertheless, Appellee seeks to charge a considerable fee for such franchises.

The *Wiggins* Court said:

> "The exaction of this license fee is identical in kind with the imposition upon a proprietor of hacks and wagons of a specified sum for every vehicle owned by him and used in carrying passengers or baggage and merchandise from East St. Louis to the City of St. Louis, by way of the bridge connecting those Cities." 107 US at 376.

The license fee demanded of Appellants is not identical in kind with those required of the proprietors of hacks and other express wagons on Mackinac Island. In fact, no other business on Mackinac Island is charged any kind of fee based on its gross receipts.

Since Appellants' franchise fees are determined by their gross receipts, Appellants are, in effect, assessed a fee on the basis of their carrying capacity and the number of times they land on Mackinac Island. The license fee in the *Wiggins* case was $100 per boat per year. The *Wiggins* Court pointed out that this fee was not measured by the number of times they crossed the Mississippi River or by the number of times they landed at the City of East St. Louis. (See 107 US at 376.) In the instant case, the gross receipts fee is charged solely for the privilege of operating a ferryboat to Mackinac Island, and thus it can be said to set a duty on both the carrying capacity and the number of times a boat lands at Mackinac Island. In short, the *Wiggins* case has no applicability to the case at bar because of the factual dissimilarity.

D) Conclusion

The Ferry Boat Code enacted by Appellee states that no person shall operate a ferryboat service to the City of Mackinac Island without first obtaining a franchise. The franchise requires the payment of 1½% gross receipts as a "franchise fee." However, Appellants receive no special benefit for the payment of this fee since Appellants own

franchise fee requirement. Appellee does nothing more for Appellants than it does for other property owners (TT of Margaret Doud, p 291a). It should be noted that had the 1½% gross receipts fee been in effect for 1978, it would have resulted in general revenue to Appellee of $36,434.00 from Appellants. The excessiveness of such a sum is underscored when it is realized that all of the fudge shops on the City of Mackinac Island cater to the same people that Appellants transport and in 1978 these fudge shops paid fees to Appellee of less than $3,000. Appellee's ordinance licensing horse drawn vehicles carrying passengers for hire, imposes a fee ranging from $10 per vehicle to $100 per vehicle. Appellee's ordinance licensing seasonal businesses, imposes a yearly fee of $200. An ordinance licensing rental horses imposes a yearly fee of $10 per horse, and an ordinance licensing rental bicycles imposes a yearly fee of $10 per bicycle. There can be no more conclusive evidence that the taxes and fees placed upon the businesses and ferryboats would be unfairly apportioned if the Ferry Boat Code is deemed valid.

The *Complete Auto Transit* Court discussed the U.S. Supreme Court case of *Colonial Pipeline Co* v *Traigle*, 421 US 100, 95 S Ct 1538; 44 L Ed 2d 1 (1975). In *Colonial*, the State of Louisiana sought to impose a tax on a pipeline owned by a Delaware corporation. The corporation did no intrastate business, and ran only 258 miles of pipeline through Louisiana. The Court in *Colonial* upheld the tax which was applied to *all* businesses qualified to carry on business in the State, but in so doing reasoned as follows:

> ". . . decisions of this Court, particularly during recent decades, have sustained nondiscriminatory properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided *benefits and protections for those activities for which it is justified in asking a fair and reasonable return.*" (Emphasis added) 421 US at 108.

Excerpts from Appellants' Brief on Appeal
To Michigan Supreme Court (p. 84)

The fees imposed by the Ferry Boat Code would result in fees being charged Appellants for the privilege of access to Mackinac Island. Appellee cannot deny that its ordinance is intended to exact a fee from the tourists for the privilege of coming to the Island (D of Raymond Horn, pp 283a-284a; D of Otto Emmons, pp 263a-264a; D of William Gough, p 259a). The net result of Appellees' Ferry Boat Code is to impose a head tax on all passengers carried by Appellants.

A tax imposed upon the number of passengers arriving on the Island via ferryboats, whether done directly or indirectly, contravenes many sections of the U. S. Constitution and Appellee's Charter. As set forth above, this tax violates the Commerce Clause, to-wit: Article I, Section 8, Clause 3 of the Constitution of the United States. The freedom to travel is constitutionally protected and has been held to be contained within the Fourteenth Amendment to the U.S. Constitution. Furthermore, Appellee's own City Charter, Section 1 of Chapter XV, (Appellants' Appendix, pp 403a-404a) preserves to all persons the right to free passage, together with their baggage, over any and all wharves and docks owned by the City. Although the City does not own the docks and wharves used by any of Appellants, the provision in the City Charter insuring the right of free passage certainly cannot be avoided by the fact that the docks are privately owned.

In the case of *Evansville* v *Delta Airlines*, 405 US 707; 92 S Ct 1349; 31 L Ed 2d 620 (1972), a municipal airport authority charge of $1.00 for each enplaning passenger was held not to violate the Federal Constitution, but the rationale was significant. The Court held that such a charge was not void if designed only to make the user of State-provided airport facilities pay a reasonable amount to defray the costs of construction and maintenance. The monies so collected were held by the airport authority in a separate fund for the purpose of defraying the present and future costs incurred by the Authority in constructing, improving or maintaining the airport.

these new revenues. The money from this tax will be put into the general fund and used for all municipal purposes that would benefit everyone on Mackinac Island (TT of Margaret Doud, pp 292a-293a). Unlike *Evansville, supra*, where the funds raised were earmarked for the construction and maintenance of the airport, the funds raised in the instant case are not specifically earmarked for use in conjunction with the ferryboat operations. The intent of the franchise fee is not to offset money spent by Appellee for the benefit of the tourists. The intent is to minimize the Island residents' taxes at the expense of the tourists.

Appellants submit that their passengers' constitutional right of travel would be infringed by enforcement of the Ferry Boat Code in that the costs of tickets and the cost of compliance with the regulation will unnecessarily increase. People who would have been able to travel with their families to and from Mackinac Island prior to any such increase might not be able to do so after the increase. Such an infringement would relate directly to the imposition of the franchise fee requirement and thus the franchise fee acts as a burden on interstate commerce and a restriction on freedom to travel.

D) Conclusion

The U.S. Constitution prohibits any burden on interstate commerce when that burden has no relationship to benefits received for the burden imposed. In the instant case, Appellants cater to many tourists from states and provinces outside Michigan. Appellants advertise heavily in other states and Appellant Arnold Transit transports a considerable quantity of freight that has it origin outside Michigan. The franchise fee would have an impact on such interstate business of Appellants since it is essentially a fee to be imposed for the privilege of doing business and no benefit is offered in return which directly related to the fee is offered in return for payment of the fee. The fee was intended to be passed along to the tourists who use Appellants' ferryboats

and thus would increase fares. Fare increases would cause a restriction on the constitutionally protected right of freedom to travel since people may not be able to afford to travel to Mackinac Island due to the higher cost, and would not receive any additional benefit or use in exchange for the higher fare increase.

The franchise fee sought to be levied by Appellee's Ferry Boat Code is a burden without a benefit. The Ferry Boat Code should be invalidated for many reasons including the undue burden it places on interstate commerce and the restriction it would work on the right of freedom to travel.

ARGUMENT VI

THE FERRY BOAT CODE IS PREEMPTED BY FEDERAL LEGISLATION.

A) Introduction

As set forth in Argument V of this Brief, Appellants are engaged in interstate commerce. The Congress of the United States was entrusted by the U.S. Constitution with the authority over interstate commerce. Furthermore, the Congress has authority over the navigable waters that Appellants travel to and from Mackinac Island. Congress has enacted legislation pursuant to its authority over interstate commerce and navigable waters. The Ferry Boat Code is in conflict with this Federal legislation, thus the Ferry Boat Code must yield.

The Trial Court granted Appellee's Motion for Summary Judgment on this issue (Decision of the Court dated May 12, 1978, Appellants' Appendix, pp 95a-97a) and the Court of Appeals did not specifically discuss this issue beyond its statement that other allegations of error set forth by Appellants were without merit.

B) Federal Preemption

The basis of the doctrine of Federal preemption is found

IN THE SUPREME COURT
OF THE STATE OF MICHIGAN

ARNOLD TRANSIT COMPANY, INC.,
STRAITS TRANSIT COMPANY, and
SHEPLER'S INCORPORATED,
Appellants,

v

No. 65982

THE CITY OF MACKINAC ISLAND,
a Charter City, incorporated
pursuant to Local Acts 1899-
No. 437,
Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Arnold Transit Company, Inc., Straits Transit Company, and Shepler's Incorporated, the Appellants above named, hereby appeal to the Supreme Court of the United States from the Final Order of the Michigan Supreme Court, entered on December 22, 1982, and the Order Denying Appellants' Motion for Rehearing dated February 18, 1983.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

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Telephone No. (517) 332-7900

DATED: May 11, 1983

DESIGNATION OF CORPORATE RELATIONSHIPS

Arnold Transit Company, Inc. and Straits Transit Company

Arnold Transit Company, Inc., and Straits Transit Company, filing their original Designation of Corporate Relationships as Appellants in this proceeding, state that they are affiliated with each other as subsidiaries of Union Terminal Piers, Inc. That neither Arnold Transit or Straits Transit have any ownership interest in any other company. That Union Terminal Piers, Inc. owns 50% of two ski resorts, Berkshire East, a Massachusetts corporation and Cannonsburg Skiing, Inc., a Michigan corporation.

Shepler's Incorporated

Shepler's Incorporated, filing this original Designation of Corporate Relationships as an Appellant in this proceeding, states that it is not owned by any parent company and has no subsidiaries or affiliates.

No. 82-1868

In the Supreme Court of the United States

October Term, 1982

ARNOLD TRANSIT COMPANY, INC., STRAITS TRANSIT COMPANY and SHEPLER'S INCORPORATED,
Appellants

vs.

THE CITY OF MACKINAC ISLAND, a Charter City, incorporated pursuant to Local Acts 1899, No. 437,
Appellee

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

NOW COMES the Appellee, City of Mackinac Island, pursuant to Rule 16, and moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the grounds that the appeal does not present a substantial federal question and that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

INTRODUCTION

Mackinac Island is a small, summer resort island located between Michigan's Upper and Lower Peninsulas. Its unique appeal to tourists is that there are no cars on the Island - transportation is by horse-drawn carriages and bicycles. The Island's architecture and lifestyle is still much the same as it was in the late 1800's. Tourists may visit the Grand Hotel or browse in the quaint shops along Main Street. Mackinac Island fudge is perhaps the most famous souvenir.

Most of the ferries to and from Mackinac Island run from May or June until September or October. One ferry runs from April through December. During the winter, the Island's 600 year-around residents travel the five miles across the straits to St. Ignace on snowmobiles - when the ice permits or by a small airplane.

The City Council of Mackinac Island passed the Ferry Boat Code ordinance in 1977. The Appellants challenged the validity of the ordinance in the Mackinac County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. Numerous arguments were raised. By way of example, Appellants' Brief to the Michigan Supreme Court contained eight separately identified issues, most of which were directed at the validity of the ordinance under state law. (See Appellee's Appendix, p. 16).

The City of Mackinac Island has prevailed on every issue in every court. Counting the Circuit Judge, the unanimous Michigan Court of Appeals panel, the unanimous Michigan Supreme Court decision and the unanimous decision to deny rehearing by a differently constituted Michigan Supreme Court, ten Judges or Justices have considered the arguments of Appellants and all ten have fully upheld the validity of the ordinance.

Although Appellants identify two "Questions Presented", it appears that their appeal involves five challenges to the Ferry Boat Code. They contend 1) that the Federal Government has preempted the field of ferryboat regulation, thereby precluding any state or municipal legislation; 2) that the ordinance's franchise fee violates the Constitution's prohibition of a "duty of tonnage"; 3) that the ordinance imposes an undue burden on interstate commerce; 4) that the ordinance violates ferry passengers' freedom of travel; and 5) that the ordinance denies the ferryboat companies equal protection and due process of law.

Through the arguments set forth in this Motion, the Appellee will examine each of the challenges presented by Appellants and demonstrate that none raises a federal issue that is substantial and worthy of further briefing and argument before this Court, and that, therefore, this Court should either dismiss the appeal or affirm the judgment of the Michigan Supreme Court.

FEDERAL PREEMPTION

In their argument that Congress has acted to preempt control of the entire subject of ferry boats, the Appellants have misstated both the facts and the law applicable to this case. A closer examination of both shows that Congress not only had no intention of preempting local control of ferries such as these, but in fact expressly provided for such local control.

This Court discussed the doctrine of federal preemption in *Commonwealth of Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), and set forth the criteria to be used to determine "whether a federal statute has occupied a field in which the States are otherwise free to legislate." 350 U.S. at 501.

> "*First* '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' Rice v. Santa Fe Elevator Corp., 331 U.S. at page 230, 67 S. Ct. at page 1152. . . . *Second,* the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' Rice v. Santa Fe Elevator Corp., 331 U.S. at page 230, 67 S. Ct. at page 1152, citing Hines v. Davidowitz, supra. . . . *Third,* enforcemen' of state . . . acts presents a serious danger of conflict with the administration of the federal program." 350 U.S. at 502-505. (Original emphasis).

Appellants' claim of federal preemption of the field of ferry boats is based on part III of the Interstate Commerce Act, 49 U.S.C. §901, *et seq.*, and the revised Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* Appellants argue that those two statutes have dominated the area so completely that neither states nor municipalities may seek to legislate regarding ferries.

In fact, however, both the original and the revised Interstate Commerce Acts expressly provide for state control of certain aspects of water carrier services. Section 903(g) of the original Act provided in part:

> "(g) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, *the provisions of this chapter shall not apply. . .*

(2) . . . *to ferries*, . . ." (Emphasis supplied).

The exclusion of ferries from the jurisdiction of the Interstate Commerce Commission was continued in Section 10544 of the revised Act, enacted in 1978.

> "(a) Except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out the transportation policy of section 10101 of this title, *the Commission does not have jurisdiction under this subchapter over transportation by water carrier when the transportation is provided*—. . .
>
> (4) *by a ferry*." (Emphasis supplied).

Thus, in defining the ICC's jurisdiction over a period of years, Congress has consistently left ferries, matters of a particularly local nature, under the control of local authorities. This express exclusion rebuts any claim by Appellants that "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." 350 U.S. at 502 It is also an expression of congressional intent that the area is not one in which the federal interest is so dominant that the federal system must be assumed to preclude adoption of state laws on the same subject. Further, where ferries have been excluded from ICC control, there is little likelihood of "conflict with the administration of the federal program." 350 U.S. at 505.

This case is analogous in this respect to *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). In that case, the appellants argued that a general declaration by Congress favoring the use of coal over natural gas products constituted preemption of the field such that the states could enact no legislation that might have an adverse impact on the use of coal. In holding that such a general policy did not constitute preemption of the field, this Court, citing prior decisions, stated:

> "As we have frequently indicated, '[p]re-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."'" 453 U.S. at 634.

The Court then examined the provisions of the Powerplant and Industrial Fuel Use Act, the source of the claimed preemption, and found an express recognition of State severance taxes such as the ones being challenged. This recognition was held to preclude a finding of federal preemption. "This section clearly contemplates the continued existence, not the preemption, of state severance taxes on coal and other minerals." 453 U.S. at 635. Similarly here, with 49 U.S.C. §10544, Congress recognized and incorporated the tradition of local control of ferry boats, and did not provide for preemption of state involvement in the area. In fact, the same argument presented by Appellants herein was rejected recently by a New York state court. In *Mascony Transport and Ferry Service, Inc. v. Mitchell*, 94 Misc. 2d 618, 405 N.Y.S.2d 380 (1978), decided under 49 U.S.C. §903, the Court noted the express exclusion of ferries from ICC control and ruled that the states have the authority to franchise ferries.

Appellants next assert that their boats are not ferries because they fit the definitions of "vessel", "water carrier" and/or "water common carrier" provided by the Act. This in itself, however, does not prevent Appellants' boats from also being ferries. It may be safely assumed that any ferry boat is "a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used as a means of transportation by water." 49 U.S.C. §10102(27) (definition of "vessel"). It would be a useless ferry indeed that could not be used for "transportation by water", and that did not hold "itself out to the general public to provide [such] transportation for compensation."

49 U.S.C. §10102(29) (definition of "water common carrier"). If ferries were not expressly excluded, they would otherwise be covered by the Act, falling as they do within a number of the definitions. The fact that they are separately excluded shows that they may also be "vessels", "water carriers" or "water common carriers". There would be no need to expressly exclude them if by definition they were not covered.

Nor does Appellants' argument that they are not "traditional ferries" such as those found under Olde English law save them. There is no reason to assume that Congress, in enacting the Interstate Commerce Acts, adopted a definition of "ferry" that has been rejected by American legislatures and courts as inconsistent with the American experience. The Michigan Courts uniformly rejected the novel, but inaccurate and unsupported "definition" of a ferry resurrected here by the Appellants.

Contrary to Appellants' assertions, this Court has not ruled that a ferry franchise must be exclusive. The state statute at issue in *Conway v. Taylor's Executor*, 66 U.S. (1 Black) 603, 17 L. Ed. 191 (1861), provided that no ferry should be established within one and one half miles from any other ferry barring certain unusual circumstances. No such circumstances had been alleged, and this Court ruled that the original ferry owner was entitled to the protection provided by state law—that was, an exclusive franchise for one and one half miles in either direction. This Court most certainly did not say, as Appellants claim, that a ferry franchise *must* be exclusive. Further, in the landmark case of *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837), involving a bridge franchise, this Court analogized to ferry franchises, and held that a franchise is presumed to be non-exclusive unless it specifically provides otherwise. Not only did this Court recognize that a franchise does not have to be exclusive, but

it expressed an obvious preference for the lack of exclusivity in franchises granted by states. See also, *Knoxville Water Company v. Mayor and Aldermen of the City of Knoxville*, 200 U.S. 22, 26 S. Ct. 224, 50 L. Ed. 353 (1906).

Courts in the United States have long recognized that exclusive ferry franchises are undesirable and contrary to American principles of competition and free enterprise. In *Shorter, et al. v. Smith, et al.*, 9 Ga. 517 (1851), the Supreme Court of Georgia discussed the issue of exclusivity of ferry franchises in these terms:

> "It is contended in behalf of the Plaintiffs . . . that by the Common Law that has been adopted in this State, their franchise, although not declared so, is necessarily exclusive; and that the Legislature cannot, either directly or indirectly interfere with it, so as to destroy or materially impair its value; . . .
>
> "And such, we concede, was the ancient doctrine in England. . . .
>
> "[I]n some of the earlier cases in this country, the Courts held that these franchises, whether expressed or implied, are so to be construed as to exclude all contiguous competition. . . .
>
> "But such is no longer the doctrine in this country. And notwithstanding the profound regrets expressed by Chancellor Kent at its overthrow, I must be permitted to say, that such a doctrine, in my opinion, is at war with the universally recognized principles of American constitutional law and totally inapplicable to our local situation and change of circumstances." 9 Ga. at 523-524.

Clearly, the *Shorter* court considered itself to be dealing with the same type of entity considered a "ferry" in England, but it did not find exclusivity to be consistent with American law or practice.

The other "characteristics" identified by Appellants fare no better when examined individually. Appellants

claim that because they own the wharves at which their boat docks, they are not "traditional ferries". Actually, the ferries in many of the Olde English cases also operated from private property near a public highway and this was not found to diminish their character as public ferries. *Hammerton v. Earl of Dysart*, 1 A.C. 57 (1916). Further, American state courts have frequently given effect to state statutes governing ferry franchises which provide a preference for applicants owning land on at least one end of the ferry's route. *Guinn v. Eaves*, 101 S.W. 1154 (Tenn., 1906); *Hudson v. Cuero L & E Co.*, 47 Tex. 56 (1877). Even the protected franchise holder in *Conway v. Taylor's Executor, supra*, cited by Appellants, owned the property from which he ran his ferry.

In *United Truck Lines, Inc. v. United States*, 216 F.2d 396 (9th Cir., 1954), the Ninth Circuit expressly rejected as "specious" the argument Appellants make here regarding ownership of the wharves.

> "Appellants argue, however, that the ferry in this instance can not be thought a continuation of a highway because, they say, the chain of continuity has been broken by the privately owned character of the road approaches on either side of the river. The argument is specious. By the very nature of a ferry the approaches to it are a necessary incident to its operation and are an integral part of the ferry owner's responsibility. In this case the short stretches of roadway connecting on either side with county highways are to be taken as part of the ferry service itself." 216 F.2d at 399.

Nor is it necessary, as Appellants assert, that a ferry be perpetual. Michigan's Constitution expressly prohibits any city from granting a franchise for a period of more than thirty years. 1963 Michigan Constitution, Article VII, Section 30. Other states have also recognized that a ferry franchise need not be perpetual. *City of Laredo*

v. Martin, 52 Tex. 548 (1878) (where a ferry franchise was granted for a period of 20 years); *Bell v. Clegg*, 25 Ark. 26 (1867) (5 years); *Nixon, et al. v. Reid*, 67 N.W. 57 (S.D., 1896) (5 years). Whatever the rule in England, the prevailing practice in the United States has been to limit ferry franchises to a term of years.

Clearly then, when Congress expressly excluded ferries from the ICC's jurisdiction in both the original and the revised Interstate Commerce Acts, it was declaring an intent not to interfere with local control of "ferries" as they have been defined under American common law, the statutes of the several states and this Court. Clearly also, the boats operated by Appellants are "ferries" within the meaning of the Act.

Appellants' last argument is a claim that the federal government has preempted control of all navigable waters. Analysis of this claim under the tests set forth above from *Commonwealth of Pennsylvania v. Nelson, supra*, shows that once again there has been no attempt by Congress to preempt the field so as to preclude state legislation regarding ferries. In support of this proposition, Appellants have quoted incompletely and misleadingly from McQuillin, Municipal Corporations (3rd ed). Far from suggesting that the Congress has preempted state control of navigable waters, McQuillin acknowledges the power vested in states and municipal authorities to exercise control over navigable waters and to franchise ferries. The quote which Appellants provided in their Statement continues as follows:

> "Navigable waters are primarily under the control of the government of the United States, with limited powers in the several states. A state may legislate concerning the disposition and use of navigable waters within its boundaries, subject, however, to the paramount authority of Congress over interstate commerce and navigable waters, and subject to vested private

property rights and the trust under which the state holds such lands for the benefit of the public. The state may delegate its powers over navigable waters within or adjacent to a municipal corporation. . . ." 3 McQuillin, Municipal Corporations (3rd ed.) §11.08, p. 14.

"The state may authorize a municipal corporation to establish and license ferries, and in some states the statute expressly authorizes municipalities to establish and acquire ferries, and to maintain, regulate and fix the tolls on ferries. The right to operate ferries around a city may carry with it the right to charge fares for the use of the facility by any person who chooses to avail himself of that use, whatever his residence." 3 McQuillin, Municipal Corporations (3rd ed.) §11.16, pp. 26-27.

Appellants also raise the spectre of conflicting regulations between franchises, but fail to note that the City of Mackinac Island derives its authority to franchise from its charter. The other two cities on Appellants' routes have different charters. It has never been shown that the charters of the other two cities give them the power to issue such franchises. Certainly they have never attempted to do so. Further, there is no conflict between the franchises issued by the City of Mackinac Island and any federal statute or regulation. As discussed herein, the two authorities operate in different spheres and without overlap.

In conclusion, absolutely nothing indicates that the federal government intended to preclude local control of ferry boats between three small towns in Michigan. Far from being a vital concern to this Court, this argument presents issues of only local concern, and no further treatment by this Court is necessary.

TONNAGE TAX

The Appellants maintain that the franchise fee is a "duty of tonnage" which is forbidden by Article I, Section 10(3) of the U.S. Constitution. Appellants' challenge to the ordinance pursuant to its tonnage tax theory can be easily discounted by reflecting upon the essence of the tonnage tax prohibition and contrasting that with the essence of the Ferry Boat Code franchise fee. The constitutional provision prohibiting the imposition of a "duty of tonnage" was to prevent local units of government from improperly interfering with our fledgling nation's trade. The objects of its prohibition were fees imposed by the localities without any justification except their taxing authority. The courts recognized, however, that it was not intended to prevent the localities from seeking remuneration for services or benefits provided to the vessels. The most common example of this latter, permissible type of fee was a fee for the use of a city-owned wharf. The wharfage charge was permissible because the vessel received a benefit (the use of the wharf) in exchange for the fee.

This distinction between a tax and a fee demanded for a direct benefit received is set forth in *Packet Company v. Keokuk*, 95 U.S. 80, 24 L. Ed. 377 (1877). "But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. . . . It is a tax on a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right or proprietorship." 95 U.S. at 84-85.

The fundamental justification for the wharfage fee was not because the use of a city-owned wharf was involved, but because the city was providing some benefit or service in exchange for the fee. The nature of the benefit or service was not critical. What was critical was whether the city was providing some valuable con-

sideration for the fee. If there was valuable consideration, then it was not a tonnage tax and was not constitutionally forbidden.

In the case before this Court, the ferryboat franchise fee is paid to the City of Mackinac Island as consideration for a valuable property right, which is the ferryboat franchise. Appellants may claim that it is a tax and that they receive no benefits from the City of Mackinac Island in exchange for the franchise fee, but the Michigan courts have resolved this state law issue against the Appellants.

The trial court ruled:

> "A franchise fee is not a tax. It is a price paid for a franchise or public right vested in an individual. . . . When a city grants a franchise it is conferring upon the franchisee a valuable property right for which payment is appropriate. The amount required to be paid pursuant to the granting of a franchise is consideration for the transfer of a property right." (Appellants' Appendix, p. 36a).
>
> ". . . the Court concludes that the franchise fee charged by the city is a quid pro quo for the property right of operating a ferry. . ." (Appellants' Appendix, p. 37a).

In its unanimous decision, the Michigan Court of Appeals ruled:

> ". . . a franchise is a right (sometimes referred to even as a property right) granted for a consideration." (Appellants' Appendix, p. 5a).

The Court of Appeals also ruled that the City of Mackinac Island may charge a fee for the granting of the ferry franchise since ferry franchises are considered ". . . grants of rights at least approaching property rights for which a consideration can be exacted." (Appellants' Appendix, p. 8a). The Michigan Supreme Court unanimously affirmed these rulings.

Thus, in spite of the Appellants' reluctance to acknowledge it, the franchise fee is not a tax, but is a payment in exchange for a specific benefit which they receive from the City and which is not provided to the public in general.

The controlling case which contrasts franchise fees and tonnage taxes is *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365, 2 S. Ct. 257, 27 L. Ed. 419 (1883). The facts of that case were remarkably similar to those of the present case. There, a ferry traveled across the Mississippi River between East St. Louis, Illinois and a point in Missouri. The ferries never used or employed any wharf or landing belonging to the City of East St. Louis. East St. Louis required what it referred to as a "license" fee as a prerequisite to operating a ferry. The Supreme Court recognized that by this act, a ferry franchise was granted.

The ferry company in *Wiggins* challenged the license/franchise fee on several bases, including the allegation that it was a duty of tonnage prohibited by Article I, Section 10, Clause 3 of the United States Constitution. The United States Supreme Court categorically rejected that theory. It found that the fee was not at all like the tonnage tax which was prohibited by the Constitution. It recognized the ferry franchise as personal property for which a fee must be paid.

> "We are of the opinion, therefore, that it is not a duty of tonnage, nor is it in its essence a contribution claimed for the privilege of using a navigable river of the United States or of arriving or departing from one of its ports and is, therefore, not prohibited by the Constitution of the United States." 107 U.S. at 376.

Instead, the Court found the fee to be a "license" fee which was "laid on the business of keeping a ferry," 107 U.S. at 376, and which was not prohibited by the United States Constitution.

Appellants cite numerous cases in which some kind of a fee was struck down as an unconstitutional tonnage tax. None of those cases, however, is applicable to the present case. None of them involved franchise fees on ferry boats. (Interestingly enough, in *Parkersburg and Ohio River Transport Company v. Parkersburg,* 107 U.S. 691, 2 S. Ct. 732, 27 L. Ed. 584 (1883), ferries were expressly excluded from the ordinance.) In most of the cases, the tonnage tax was exacted upon all boats or vessels coming into or tieing up in the local harbor. The localities claimed no right to franchise those boats. Therefore, they could offer no franchise in exchange for the fee they were imposing. The Court in *Inman Steamship Co. v. Tinker,* 94 U.S. 238, 24 L. Ed. 118 (1877), while striking the levy in that case, noted the lack of a benefit in exchange for the fee. "[I]t is exacted where there is nothing to be paid for." 94 U.S. at 245. The City of Mackinac Island Ferry Boat Code does not apply to all boats which come into the harbor at Mackinac Island, only to those persons operating public ferry services to and from Mackinac Island, who the Michigan Supreme Court has ruled the City may properly franchise and charge a franchise fee.

Two of the cases cited by Appellants, *Harmon v. City of Chicago,* 147 U.S. 396, 13 S. Ct. 306, 37 L. Ed. 216 (1893) and *Moran v. City of New Orleans,* 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884), did involve "license" fees, but those were for tugboats and there was no suggestion of a requirement for a franchise in order to operate tugboats, as there is for ferries. None of the cases cited by the Appellants is instructive.

The U. S. Supreme Court in *Wiggins, supra,* has considered a ferryboat franchise fee and has found it not to conflict with the United States Constitution's prohibition against a duty of tonnage. The Appellants' thesis presents no substantial federal question and further consideration by this Court is unnecessary.

UNDUE BURDEN ON INTERSTATE COMMERCE

Appellants assert that the Ferry Boat Code imposes an undue burden on interstate commerce. It is the position of the Appellee that this is not a meritorious issue.

First, and of foremost importance, the Appellants have not shown that their ferryboats operate in interstate commerce. Unless the Appellants establish this, no burden on interstate commerce in violation of the United States Constitution can exist. The Trial Court correctly ruled that the Appellants are not operating in interstate commerce. The Court of Appeals found the Appellants' contentions in this regard to be "without merit" and the Michigan Supreme Court unanimously affirmed.

The commerce clause, Article I, Section 8, Clause 3, of the U.S. Constitution, confers upon the Congress the power "to regulate commerce with foreign nations, and among the several States. . . ."

The facts undeniably establish that the ferryboats are not operating in interstate commerce. Their routes take them from one of two points within the State of Michigan (either St. Ignace or Mackinaw City) to Mackinac Island, also within the State of Michigan. Both the points of embarkation and destination are within the State of Michigan. They travel a direct route, never leaving the waters of the State of Michigan. The Appellants' ferryboats are subject to the laws of no other state than Michigan.

Overwhelming legal authority demonstrates that Appellants' ferries are not engaged in interstate commerce. In *United States v. Yellow Cab*, 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 210 (1947), several taxicab companies were alleged to have conspired to restrain and monopolize trade in violation of the Sherman Act. Their passengers included those transferring between rail stations, those traveling from rail stations to homes or offices, and those traveling between other points in Chicago. It was argued

that since they served some passengers who were transferring between rail stations as part of a continuing interstate journey, the taxis were in interstate commerce. The Supreme Court reasoned that, except with respect to operations pursuant to specific contractual arrangements with railroad companies, the taxis' "relationship to interstate transit is only casual and incidental." 332 U.S. at 231.

In ruling that the taxis were not engaged in interstate commerce, this Court stated:

> "Interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. . . What may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations." 332 U.S. at 231.

For travel wholly within one state to be in interstate commerce, it must be part of a continuous interstate journey. A ferryboat shuttle trip to Mackinac Island is a uniquely local excursion. It is not part of any continuous interstate journey. It has been stipulated by the parties that 95% of the passengers who ride the ferries arrive at the docks by their own private automobiles. (Appellants' Jurisdictional Statement, pp. 2-3). According to the testimony of Mr. Hugh Rudolph, General Manager of Appellants Arnold Transit Company and Straits Transit Company, 98% of their passengers purchase round trip tickets which would take them to Mackinac Island and then back to the point of beginning. (Trial Transcript, p. 88). The remaining 2% would be one way tickets since the ferries travel only from Mackinaw City to Mackinac Island and back or from St. Ignace to Mackinac Island and back. The ferries do not travel to any other cities, nor is Mackinac Island an intermediate stop in a trip from Mackinaw

City to St. Ignace or vice versa. A ride on one of Appellants' ferries can hardly be described as an integral part of a continuous interstate journey.

Certainly, the mere fact that some of the passengers reside in states other than Michigan does not, as Appellants suggest, automatically place the Appellants in interstate commerce. If that theory is true, every local system of transportation, including all intra-city buses and taxis would be in interstate commerce if they accepted passengers who lived out of state. Even the horse drawn carriages transporting visitors around Mackinac Island would be in interstate commerce since they carry persons living in states other than Michigan. Such a determination would clearly violate the admonition of the Supreme Court in *Yellow Cab* to be intensely practical in defining the scope of interstate commerce.

Following the guideline set out in *Yellow Cab*, the Ninth Circuit, in *Mateo v. Auto Rental Company, Ltd.*, 240 F.2d 831 (9th Cir., 1957), held that a limousine service operating out of the Honolulu Airport was not engaged in interstate commerce. The limousine service transported airline and steamship passengers to and from Honolulu International Airport or the Port of Honolulu and the downtown and Waikiki districts. Fifty percent of the passengers had pre-paid and/or pre-arranged the limousine service prior to leaving their departure point. Citing the *Yellow Cab* standard, the court noted that the ultimate test in determining whether Auto Rental Company was engaged in interstate commerce was ". . . whether the local transportation service is an integral step in the interstate movement." 240 F.2d at 833. The court held that no interstate commerce was involved, noting that when a person arrived at the Honolulu Airport he or she had "arrived" in Hawaii in the commonly accepted sense. The court said that "Those who thereafter furnish him transportation are engaged in activity of a purely local nature." 240 F.2d at 835.

The Interstate Commerce Commission, also following the *Yellow Cab* doctrine, has determined that motor carriers which operate out of airports are not in interstate commerce unless they operate by means of through ticketing arrangements including contracts between two or more different transportation systems. *Motor Transportation of Passengers Incidental to Transportation by Aircraft*, 95 M.C.C. 526 (1964).

In *James T. Kimball - Petition for Declaratory Order*, 131 M.C.C. 908 (1980) the Commission ruled that an airport limousine service which provided ground transportation between two Florida airports and hotels located within 25 miles of the airports, and which operated as part of a one price package tour originating at points outside of Florida, and which was organized by a travel and tour agency located outside of Florida, was not in interstate commerce.

The Fifth Circuit U. S. Court of Appeals recently described a somewhat broader standard for determining whether a mode of transportation is in interstate commerce. Even under that standard, Appellants are still clearly not operating in interstate commerce. In *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586 (5th Cir., 1982), Charter Limousine operated a limousine service between Miami International Airport and surrounding counties. Operating as part of a complex nationwide reservation system, Charter carried passengers who had pre-arranged their transportation through this national system before arriving at Miami International Airport on flights from other states. While the Fifth Circuit found Charter to be operating in interstate commerce, it did so only because of the unique nationwide system of pre-arranging travel. The opinion makes it clear that the mere fact that passengers using Charter's services had traveled from states other than Florida was not significant.

The Appellants' ferryboats are far more of a local enterprise than any of the carriers involved in the above-described cases. It is abundantly clear that under any of those criterion, Appellants are not operating in interstate commerce.

Appellants present sparse authority in support of the notion that they are operating in interstate commerce. The fact that the ferries travel navigable waters does not mean that they are necessarily in interstate commerce. Appellants would apparently contend that every fisherman and weekend sailor who ventures onto the Great Lakes is also in interstate commerce.

The definition of navigable waters in this country is very broad. It is an entirely different question from the question of whether a vessel is engaged in interstate commerce. Navigable waters include any body of water upon which a boat can float. Individuals traversing those navigable waters may or may not be in interstate commerce. The test depends upon the nature of the activity, not upon the body of water involved. The general rule is that the states have the power to regulate and control navigable waters within their own boundaries. 78 Am. Jur. 2d, Waters, §76, p. 519. Thus, the mere fact that ferries travel on navigable waters, does not place them in interstate commerce.

The Steamer Daniel Ball v. United States, 77 U.S. (10 Wall.) 557, 19 L. Ed. 999 (1870) does not support Appellants' theory. There, the issue was whether the steamboat was traveling on navigable waters. A federally enacted statute applied to all vessels upon "the bays, lakes, rivers, or other navigable waters of the United States. . ." 77 U.S. at 558. The Supreme Court merely concluded that the river on which the steamboat traveled was a navigable river and that Congress was within the scope of its permissible authority when it adopted the legislation. That case should not be seen as compelling the

conclusion that the ferryboats transporting summer tourists back and forth to Mackinac Island are in interstate commerce.

Dean Milk Company v. City of Madison, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951) simply does not stand for the proposition for which Appellants cite it. That case involved a challenge by an Illinois milk distributor to a Madison, Wisconsin ordinance prohibiting the sale of milk within the city unless it had been pasteurized within five miles of the center of the city. The Court simply concluded that such an arbitrary and unnecessary restriction unfairly discriminated against interstate commerce. The question of whether the milk distributor was in interstate commerce was not addressed. *Dean Milk's* fact situation and holding are totally inapplicable to the present situation.

In determining whether the ferryboats are operating in interstate commerce, the actions and statements of the Appellants themselves are enlightening. Of the three ferryboat companies which are parties to this litigation, only one, Arnold Transit Company, has filed a tariff with the Interstate Commerce Commission. The fourth ferryboat line, the Star Line, is not a party to this appeal, but joins Shepler's, Inc. and Straits Transit Company in never having filed with the Interstate Commerce Commission. If Appellants Straits Transit Company and Shepler's Inc. actually believe that they are engaged in interstate commerce, why have they made no attempt to file with the Interstate Commerce Commission? The Appellants cannot be taken seriously when they claim to be in interstate commerce since if it is true, two of the three Appellants (plus the Star Line) would have been intentionally violating the law by failing to subject themselves to the authority of the Interstate Commerce Commission.

Even Arnold Transit Company, the only ferry company which had any contact with the ICC, concedes that its interstate involvement is insignificant. At trial, Mr. Hugh Rudolph, General Manager of Arnold Transit Company, testified that of a total passenger revenue of $1,154,710.00, only $10,046.00 was derived from non-resident passengers. Thus, by the Arnold Transit Company's own admission, only about one-eighth of one percent of their passengers could be in interstate commerce. (Trial Transcript, p. 116).

Therefore, on the basis of the uncontroverted facts, the Appellants' own statements and actions, and the authorities cited, it is abundantly clear that the ferryboats which travel to and from Mackinac Island are not in interstate commerce.

Appellants contend that the franchise fee of 1 1/2% of Appellants' gross receipts for providing ferry service to and from Mackinac Island is an oppressive and unconstitutional burden on interstate commerce. As is explained above, the Appellee vigorously denies that Appellants operated in interstate commerce. However, for the sake of argument, even if Appellants could be said to be operating in interstate commerce, the franchise fee is certainly no burden.

During the current (1983) season the approximate amount Appellants charge for a round trip adult fare to Mackinac Island is $6.00. At that fare, the franchise fee charged to Appellants would amount to a mere 9 cents for each round trip adult passenger. It is frivolous to suggest that the franchise fee is a burden of such a substantial nature as to require the consideration of this Court.

It is well recognized that states or their political subdivisions may, within limits, validly impose regulations that affect interstate commerce.

> "Although the criteria for determining the validity of State statutes affecting interstate commerce have

> been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

Throughout this nation's history, ferries have been regarded as matters of particularly local concern. That is certainly true of Mackinac Island where the ferries play a substantial role in the life of the Island residents. The modest impact of the Ferry Boat Code is appropriate considering the legitimate and substantial local interest.

Neither *Evansville-Vandenburg Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), nor *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1868) supports Appellants' contentions. *Crandall* involved a tax where no identifiable benefit was provided. It was imposed directly on citizens crossing the state line, and applied even to passengers in privately owned modes of transportation. The franchise fee is not a tax, but payment for a specific benefit; it is owed by the ferryboat companies, not its passengers; and it does not apply to private boats traveling to or from Mackinac Island (which have no need for a ferry franchise). To the extent that it is applicable at all, *Evansville* supports the City's position because it permits a charge for a benefit actually provided.

Appellants' reliance on *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), is also misplaced. Unlike the present situation, that case involved a tax which was unrelated to the benefits provided. Moreover, the objects of the tax in *Complete Auto Transit* moved between different states. Appellants torture this constitutional concept by attempting to apply

it to ferryboats which travel back and forth between two cities within the same state.

On the basis of the authority cited above, the City of Mackinac Island urges this Court to conclude that when Appellants suggest that the Ferry Boat Code constitutes an undue burden on interstate commerce, they present no substantial federal question deserving of further treatment by this Court.

FREEDOM TO TRAVEL

Appellants have argued that the Ferry Boat Code places a burden on their passengers' right to travel in violation of various provisions of the U. S. Constitution. Appellee does not dispute that this Court has recognized that the Constitution prohibits the imposition of burdens on the right to travel between the states, but submits that the Ferry Boat Code does not violate the Constitution in this regard.

In making this argument, the Appellants claim to be protecting not their own right to travel, but that of their passengers. This Court has often held, however, that "the Plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). See also *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960). Thus, Appellants do not have standing to raise this challenge to the ordinances based on the alleged impact on their customers' right to travel.

Assuming, however, that Appellants have standing to assert this constitutional challenge to the Ferry Boat Code, the franchise ordinance does not violate the passengers' constitutional right to freedom of interstate travel.

First and foremost, as explained fully in the interstate commerce portion of this Motion, neither Appellants, nor their passengers are in interstate commerce. The only

authorities cited by Appellants involved travel between different states, not travel between three small towns located within one state. If the passengers are not traveling in interstate commerce, then the Ferry Boat Code obviously cannot infringe on their right to freedom of interstate travel.

Second, even if interstate commerce was involved, the ordinance would not burden the passengers' right to freedom of interstate travel. Where a benefit is conferred, a reasonable charge for that benefit may be imposed and should not be construed as an unlawful burden on the right to travel.

This principle was the basis used by the United States Supreme Court in *Evansville-Vandenberg Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) to uphold a fee of $1.00 per airline passenger charged to help defray the cost of construction and maintenance of airport facilities. The key in *Evansville* was that a benefit was being provided in exchange for the fee.

In the present case, the ferryboat companies are charged a franchise fee as payment for the specific benefit of the ferry franchise. It is inaccurate to suggest that the franchise fee is imposed on the passengers. It is charged only to the ferryboat companies and is not a flat per person fee. The fact that the cost of the franchise fee may be passed on to the passengers as a cost of business does not mean that the franchise can be said to be imposed on the passengers. All costs of doing business, whatever their source, are in some way passed on to the customers of that business. The suggestion that every financial obligation imposed upon interstate passenger carriers is a burden on the right to travel because it might be passed on to their passengers is unsupportable and irrational.

However, even if the passengers do ultimately bear part of the cost of the franchise fee, they will certainly

enjoy substantial benefit from it. Virtually all of Mackinac Island is a tourist resort. One hundred per cent of the business on the Island is tied, directly or indirectly, to the tourist business. The City's intended use of these franchise fees is to make Mackinac Island a better tourist resort. Nothing could benefit the ferryboat passengers more than to enhance the beauty and appeal of Mackinac Island. When considered in this light, it is clear that a possible increase of nine cents on a $6.00 adult round-trip ticket is perfectly reasonable and constitutes no burden on the passengers' travel.

It is also clear that the franchise fee is non-discriminatory because the charge, if passed along to the passengers, would affect all passengers, whether in interstate commerce or intrastate commerce, exactly the same way.

Even if Appellants have standing to assert the claim, their argument that the ordinance violates the constitutional right to freedom of interstate travel is unconvincing. The passengers are not in interstate commerce, a clear benefit is received in exchange for the fee and the charge is reasonable and non-discriminatory. For these reasons, the ordinance does not infringe on the passengers' right to travel.

EQUAL PROTECTION AND DUE PROCESS

In their Jurisdictional Statement, Appellants have alleged that the City's requirement of a ferry franchise violates their right to equal protection and due process under the Fourteenth Amendment to the United States Constitution. The basic flaw in this argument, and the reason it must fail, is that the City's Ferry Boat Code does not impose a tax, but rather requires a franchise.

The City's Charter does not authorize it to require franchises of types of transportation other than ferries, nor does it empower the City to franchise other types of business enterprises. The Michigan Courts have unani-

mously ruled that the City is acting within its power under Michigan law in requiring franchises of the Appellants, and that the franchises issued by the City to the Appellants are valuable property rights given in exchange for the franchise fees charged. Appellants have ignored the rulings of the Michigan Courts in presenting their case to this Court. In so doing, they have repeatedly asserted that the franchise fee is a "tax", and they rely heavily on cases involving taxes. It is important for the Court to remember in reading this portion of Appellants' Jurisdictional Statement, however, that the franchise fee involved here is not a tax; it is a charge for a valuable property right. With that in mind, all of Appellants' alleged violations of the Fourteenth Amendment are meritless.

Appellants' arguments on equal protection boil down to the complaint that the City franchises ferries, but does not franchise other Island businesses. Appellants also claim that the ordinance has no "rational relation to a legitimate purpose", thus denying them equal protection. As discussed above, the Michigan courts have resolved the fact that the City was acting within its delegated authority in franchising the Appellant ferryboat operators. There is nothing arbitrary or irrational about the City's decision to franchise ferries. The City is fulfilling its municipal obligation in issuing the ferry franchises that secure ferry service for the residents and tourists coming to the Island. Certainly, this is a rational and legitimate purpose.

Further, the City does not violate the Appellants' right to equal protection by not requiring franchises of other types of businesses. The law has never required states and municipalities to treat differently situated persons identically. Appellants slide over the fact that the nature of their business is inherently different from that of other businesses. Other businesses do not need franchises.

and concomitantly, the City does not have the authority to issue franchises to them. The City can hardly be faulted for failing to do what it has no power to do; nor should it be condemned for exercising the power it has been granted.

In *Tigner v. State of Texas*, 310 U.S. 141, 60 S. Ct. 879, 84 L. Ed. 1124 (1940), reh. den. 310 U.S. 659, 60 S. Ct. 1092, 84 L. Ed. 1422, this Court examined a Texas statute which excluded agricultural business enterprises from criminal punishment for monopolistic activities to which all other types of business were subject. In holding that the statute did not violate the equal protection clause, this Court said:

> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. . . . *The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.* And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature." 310 U.S. at 147. (Emphasis supplied).

Similarly in the present case, the City is not required to treat different things identically, and it may franchise ferryboats without franchising other businesses.

Appellants cite *Covington and Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896) and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 420, 14 S. Ct. 1062, 38 L. Ed. 1031 (1894), implying that those cases held that the raising of revenue through the issuance of a franchise is arbitrary and an illegitimate exercise of municipal power. They did not so hold. *Covington & Lexington Turnpike Road Co.* involved a challenge to the action of the state legislature in setting different

rates on different toll roads. This Court ruled that a legislature may differentiate between roads in setting toll rates, provided there are circumstances justifying the differentiation, such as traffic volume, size of road, location, etc. *Reagan v. Farmers' Loan & Trust Co., supra*, involved similar considerations as to railroad rates. These cases support the City's actions in showing that a reasonable distinction between businesses based on the nature of their operations does not violate constitutional principles of equal protection.

It is interesting to note that Appellants have not cited a single case involving a franchise in their arguments on equal protection and due process. What they have cited are a variety of cases discussing taxes. The so-called single factor formula cases involve states taxing businesses with interstate operations without adequately apportioning the amount of tax charged to the amount of business performed in the taxing state. What relevance these cases have to the instant one where a franchise to operate a ferry totally within one state is being granted by a city is unclear. Certainly the City is not, as the Michigan Courts have all recognized, seeking to tax the Appellants' income. The franchise fee is a charge for a valuable property right, not a tax.

Finally, without citing authority for the proposition, Appellants claim that the City must grant them "a right to use public property in a fashion not enjoyed by the public at large" (Appellants' Jurisdictional Statement, p. 27) in order to charge a franchise fee. They cite trolleys and utilities which lay tracks, pipes or lines in the public right of way as examples of franchisees who do receive such a right. In making this argument, Appellants once again ignore the fact that the Michigan Courts have ruled that the franchises which they receive are valuable property rights. Appellants are attempting to resurrect before this Court state issues already resolved against them.

In conclusion, it can be seen that Appellants' arguments on these issues misstate the law and the facts, and ignore the rulings of the Michigan Courts under state law. Because the City of Mackinac Island properly exercised its authority in enacting the Ferry Boat Code, because the ferry boat owners are all treated equally, because the City of Mackinac Island has required franchises of ferries for a rational and legitimate state purpose, and because Appellants receive a valuable property right and are not being deprived of property without due process, Appellants' claim of a violation of their right to equal protection and due process lacks substance and merits no further attention from this Court.

CONCLUSION

In conclusion, none of the arguments advanced by Appellants presents a federal question that is sufficiently substantial to warrant further briefing and oral argument, and therefore, Appellee, City of Mackinac Island urges this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

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APPENDIX

APPELLANTS' FRAMING OF THE ISSUES IN THE MICHIGAN SUPREME COURT:

"I. APPELLEE DOES NOT HAVE THE AUTHORITY TO REQUIRE FRANCHISES OF APPELLANTS ....

II. THE FRANCHISE THAT APPELLEE SEEKS TO IMPOSE ON APPELLANTS DOES NOT POSSESS THE CHARACTERISTICS NECESSARY TO PERMIT APPELLEE TO RAISE REVENUE BY ITS IMPOSITION .....

III. APPELLANTS HAVE ACQUIRED FRANCHISES TO OPERATE THEIR FERRYBOATS BY PRESCRIPTION .....

IV. THE FERRY BOAT CODE FRANCHISE FEE VIOLATES THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST THE LAYING OF A DUTY OF TONNAGE .....

V. THE FERRY BOAT CODE CONSTITUTES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND RESTRICTS THE RIGHT OF FREEDOM TO TRAVEL .....

VI. THE FERRY BOAT CODE IS PREEMPTED BY FEDERAL LEGISLATION .....

VII. THE FERRY BOAT CODE IS PREEMPTED BY MICHIGAN LEGISLATION .....

VIII. THE FERRY BOAT CODE SHOULD BE INVALIDATED BECAUSE OF VIOLATIONS OF THE OPEN MEETINGS ACT .....

49 U.S.C. §903(g):

"(g) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this chapter shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, or (2) to transportation by small craft of not more than one hundred tons carrying capacity of not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers, or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors."